TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 447.

CLINTON J. HUTCHINS, TRUSTEE, APPELLANT,

vs.

WILLIAM W. HERRICK, LIMITED, A CORPORATION.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

FILED JUNE 9TH, 1908.

(21,000)

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1 In the Circuit Court of the Third Judicial Circuit (Transferred to First Judicial Circuit), Territory of Hawaii.

W. W. BIERCE, LIMITED, Plaintiff,
vs.
C. J. HUTCHINS, Trustee, Defendant.

Replevin.

Bill of Exceptions.

Be it remembered that the above entitled cause came on regularly for trial in the above entitled court on the 7th day of March, A. D. 1904, Honorable J. T. De Bolt, Presiding, and the jury having been waived: Kinney, McClanahan & Cooper and S. H. Derby, appearing for the plaintiff, and John W. Cathcart and Castle & Withington and W. L. Whitney, appearing for defendant:

Thereupon proceedings were had and testimony taken in said cause, the following exceptions were duly taken and reserved by said defendant upon said trial; and said defendant now presents, serves and files said exceptions as contained in this Bill of Exceptions, and the exceptions upon which he relies herein, and because of which he prays the reversal and annullment of the judgment herein.

2 Exception No. 1.

Upon the above entitled cause being called for trial on the 7th day of March, A. D. 1904, the plaintiff presented the following motion and asked leave to amend its complaint herein:

In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii. December, 1903, Term.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Motion to Amend.

Now comes the above named plaintiff, by its attorneys Kinney, McClanahan & Cooper, and moves to amend its complaint heretofore filed herein as follows:

In paragraph 5 on the third page of said complaint on the first and second line of said paragraph, strike out the words "a supplementary contract in writing was," and *in* insert in lieu thereof the words, "said agreement of February 21, 1900, was adjusted and settled by a contract in writing."

In paragraph 6 on the fourth page of said complaint, on the second line of said paragraph striking out the word, "supplementary" and adding after the word "contract" on said line, the words "of March 13th, 1901."

In paragraph 7 on the fifth page of said complaint on the first line of said paragraph, strike out the word "supplementary," and add after the word "contract" on said line the words "of March
3 13th, 1901."

In paragraph 14 on the seventh page of said complaint strike out the words "Fifteen Thousand Dollars" and repeated numerals in brackets, and add in lieu thereof the words, "Twenty Thousand Dollars."

This motion is based on the records, and the affidavit of E. B. McClanahan attached to and made a part hereof.

Dated March 4th 1904.

KINNEY, McCLANAHAN & COOPER,
Attorneys for W. W. Bierce, L't'd.

Defendant oppo d the granting of said motion and after argument said court allowe the same and granted leave to said plaintiff to amend its complai t as in said motion asked and requested, to which ruling of the cou defendant then and there duly excepted, and said ruling is here and now assigned as error by said defendant.

Exception No. II.

In pursuance of a stipulation made and filed in said cause, counsel for plaintiff proceeded to read in evidence the deposition of Columbus Bierce, and during the reading of said deposition the following occurred:

Mr. CATHCART: I move to strike out the conclusions of certain portions of the answer. (Referring to answer to 25th interrogatory) I will have to read a little in advance. "All efforts to collect anything on this note having failed and the collateral having apparently become worthless, William W. Bierce, Limited, about January 1st, 1903, instructed its attorneys Messrs. Kinney, Ballou & McClanahan,
to proceed by all lawful means to recover back for William W.
4 Bierce, Limited, the possession of the goods in question, conditionally delivered to the Kona Sugar Company, Limited, as the property of William W. Bierce, Limited." I move to strike out the words "conditionally delivered to the Kona Sugar Co. Ltd., as the property of William W. Bierce, Ltd." His answer here shown a conclusion of law.

I further move to strike out all that part with reference to what he instructed—what William W. Bierce, Ltd., about January 1st, 1903, instructed its attorneys to do, on the ground, if the court pleases, that it is not the best evidence of what he says here. It is in writing and should be put in evidence—read in evidence.

The COURT: I think he is testifying to a fact there. Motion to strike out will be denied.

Mr. CATHCART: Exception. (Stenographer's Notes p. 3-4.)

Defendant having duly excepted to said ruling of the court, the said ruling is here and now assigned as error by said defendant.

Exception No. III.

Immediately thereafter and during the reading of the answer to interrogatory 26 in the deposition of Columbus Bierce aforesaid, the following occurred:

Mr. CATHCART: I would like to make the same motion in regard to the answer to interrogatory 26, asking that all, this part of the answer be stricken out on the ground it is a conclusion of law: "holding it as the property of William W. Bierce, Ltd., until fully paid for."

The COURT: I think it is the same. The motion to strike will be denied.

5 Mr. CATHCART: Exception. (Stenographer's Notes p. 4.)

To which ruling of the court the defendant duly excepted, and said defendant now assigns said ruling as error.

Exception No. IV.

Thereafter and during the reading of the deposition of Columbus Bierce, aforesaid, counsel for plaintiff read interrogatory 40 as follows:

Interrogatory 40th. If in answer to the last preceding interrogatory you have stated, among other things, that during the middle and latter part of the year 1902, you were informed by your attorneys in Honolulu, Messrs. Kinney, Ballou & McClanahan, that they, acting as your attorneys, had given notice of a claim of lien and had subsequently instituted and action on said lien against the rails, engines, cars and other railroad equipment referred to in the preceding interrogatories, which were at that time in the possession of the Kona Sugar Company, Limited, state what information or belief, if any, William W. Bierce, Limited, had, at the time they were notified that a lien had been filed in regard to the rights of the Kona Sugar Company, Limited, in and to the land over which the plantation railroad ran.

And the following then occurred:

Mr. CATHCART: I desire to object to that.

Mr. MCCLANAHAN: Object to what, the question?

Mr. CATHCART: Yes. I have no objection to the Court reading the answer, if the court wishes to, I merely would like to put it in my objection now as incompetent, irrelevant and immaterial, then the answer and then I can move to strike it out. The question is "State what information or belief, if any, William W. Bierce, Ltd., had at the time they were notified that a lien had been filed

6 in regard to the rights of the Kona Sugar Company, Limited, in and to the land over which the plantation railroad ran."

Mr. MCCLANAHAN: I want to show that the Kona Sugar Com-

pany, had no title to the land and therefore our remedy was ineffective and abortive and we are not estopped by virtue of bringing that. (Referring to mechanic's lien.)

Mr. McCLANAHAN: If I may be allowed I would say that we are going to be charged in this case, I suppose, with an election of remedies. Now if that be so it will become very important for this court to know the state of information resting within our knowledge when we did so elect, as it is going to be charged.

(Argument.)

The COURT: That question and the answer will not be really considered evidence. It will not be considered by the court at this time, but if it appears later that it is proper to consider it, I will do so. As it now appears to me it seems to be immaterial. The title to the land has nothing to do with this case. If the materiality does not later appear, why then of course it is—your objection will be sustained—or I can sustain the objection now, with the understanding that the objection——

Mr. CATHCART: I would like to have the Court do that, because if it is read now——

The COURT: Well then the objection will be sustained, however, giving plaintiff an opportunity to offer it later if the materiality of it appears.

Mr. McCLANAHAN: I will make this offer then: It appears
7 to the court to be immaterial. Now I ask that it be allowed to go in and will prove it to be material.

The COURT: I was expecting you would make that offer all along. Well then it may be read with the offer of counsel to show the materiality. If it does not appear then I will entertain a motion to strike it out.

(Answer read.)

Mr. CATHCART: I move to—I suppose I have got to move to strike out a part of this. Take all that part of the answer which says, "And under all the circumstances it was a reasonable and necessary inference on our part,"—from that to the end of the answer, if the court please. I move to strike it out on the ground that it is incompetent, irrelevant and immaterial and a conclusion.

The COURT: I think the whole answer simply amounts to this: that the plaintiffs had good reason to believe and did believe that is what it amounts to.

Mr. McCLANAHAN: If the evidence is going to be material it is going to be to show the condition of the mind of the plaintiff in making this election.

The COURT: I think upon that ground the motion to strike will be denied.

Mr. CATHCART: Exception. (Stenographer's Notes 5-6-7.)

Which ruling of the court was duly excepted to by defendant and said ruling is here and now assigned as error by said defendant.

Exception No. V.

Thereupon counsel for the plaintiff read the 41st interrogatory propounded to said Columbus Bierce, as follows:

8 Interrogatory 41st. State what information or belief, if any, William W. Bierce, Limited, had at the time they were notified that an action had been begun on said lien against the railroad equipment, etc., referred to in the last preceding interrogatory.

And thereupon the following occurred:

Mr. McCLANAHAN: (Continues reading. Reads 41st interrogatory).

Mr. CATHCART: If the court please I make the same objection to this,—incompetent, irrelevant and immaterial.

Mr. McCLANAHAN: We make the same offer.

The COURT: Seems to be the same.

Mr. CATHCART: Exception. (Stenographer's Notes p. 7.)

To which ruling of the court defendant duly excepted and said ruling is here and now assigned as error by said defendant.

Exception No. VI.

Thereupon interrogatory 42nd propounded to said Columbus Bierce was read by plaintiff as follows:

Interrogatory 42nd. If in answer to the last two preceding interrogatories you have stated that at the times therein referred to William W. Bierce understood and believes that the plantation railroad of the Kona Sugar Company, Limited, which railroad was made up by the rails, engines, cars, etc., referred to in these interrogatories, state what, if any, understanding or belief William W. Bierce has upon that subject at the present time.

And thereupon the following occurred:

(Mr. McClanahan reads 42nd interrogatory.)

Mr. CATHCART: I object to that as incompetent, irrelevant and immaterial.

9 Mr. McCLANAHAN: I was going to make this offer: We will prove that this state of affairs and this knowledge and information on the part of W. W. Bierce at this time was also had at the time of the discontinuance of the mechanic's lien suit. We will make that offer to prove that.

The COURT: I think it has some bearing. The objection overruled.

Mr. CATHCART: Exception. I suppose it is accepted subject to the same offer to make it material?

Mr. McCLANAHAN: Yes, and further that we are going to make this showing. (Stenographer's Notes p. 7-8.)

Said ruling of the court having been duly excepted to by defendant, the said ruling is here and now assigned as error by said defendant.

Exception No. VII.

Thereupon the answer to the 42nd interrogatory propounded to said Columbus Bierce was read in evidence as follows:

Answer to Interrogatory 42. Our understanding and belief that the plantation railroad in question of the Kona Sugar Company, Limited, was constructed upon land the title to which was held by the Kona Sugar Company, Limited, existed until about the first of January 1903, when our Chicago counsel, Mr. H. W. Prouty, upon his return from his trip to Honolulu, in connection with this case, told us that he had learned, while in Honolulu, that the Kona Sugar Company, Limited, held no title whatsoever and never had held title, in any form, to the land on which this plantation railroad was constructed, and over which it ran, and according to the best information
10 we have been able to obtain, appeared to have been and still to be a trespasser thereon, in constructing and operating its railroad on the land, greatly to our astonishment and contrary to all the information we had previously received on the same subject. At about the same time we were advised to the same effect by letters received in the usual course of mail in our office in Chicago, from our Honolulu counsel, Messrs. Kinney, Ballou & McClanahan. In the wildest flights of our imagination we had never imagined that anybody other than an id-ot or an insane man would attempt to build a railroad without title to or right of way over the land whereon the railroad was to be constructed, and as soon as our previous misinformation on this subject had been corrected by the information first received by us on about the first of January, 1903, from Mr. Prouty and from Messrs. Kinney, McClanahan & Bigelow, in the manner as I have stated, that this identical thing had been done in the case of the plantation railroad in question of the Kona Sugar Company, Limited, viz; the improvident and insane construction and operation of its railroad on land to which it held no title and over which it never had any right of way whatsoever, we promptly instructed our Honolulu attorneys, Messrs. Kinney, McClanahan & Bigelow, to dismiss the suit brought and claim filed by them for the purpose of enforcing the mechanic's lien on the railroad in question, for the balance of the contract price of the railroad equipment, to which I have previously referred in my testimony.

And the following occurred:

Mr. CATHCART: Now I move to strike out the portions of the answer which I will read: Strike out all that portion of the answer commencing: "At about the same time we were advised to the
11 same effect by letters received in the usual course of the mail in our offices from our counsel—Honolulu counsel, Messrs. Kinney, Ballou & McClanahan," on the ground it is not the best evidence. The letters themselves speak for what the Honolulu office advised; and strike out—strike it all out, on the ground that it is argumentative and that it appears that it is hearsay, and showing no facts whatever as to the title—as to the title of any—as far as any positive information they had received at this time as to the title.

Mr. McClanahan: We admit that it is hearsay, but it does not come within the rule of hearsay. It is not offered for the purpose of establishing a fact, it is offered for the purpose of showing the information which we had.

The Court: It shows a basis upon which the action——

Mr. McClanahan: Exactly.

The Court: Well, the motion will be denied.

Mr. Cathcart: Exception. (Stenographer's Notes p. 8.)

Said ruling of the court was then and there duly excepted to and defendant now assigns said ruling as error.

Exception No. VIII.

In pursuance of a stipulation made and filed in said cause the deposition of Alexander Lindsay, Jr., was read by the plaintiff in evidence and during the reading of said deposition the following questions and answers were read:

A. I was engaged by the firm of Kinney, McClanahan & Bigelow to proceed to Kona, and at the auction sale of the Kona Sugar Company, Limited, Estate, which was proposed, I was instructed to make a protest on behalf of William W. Bierce Company, Limited, against such sale.

12 Q. What was this sale—what was the nature of the sale?

A. It was the Receiver's sale made under order of the Judge of the Third Circuit Court.

Q. Did you make such protest?

A. I did.

Q. In what form did you make it?

A. After the auctioneer stated the purpose of the sale, I then read aloud a notice that I had with me protesting against that sale.

Q. Would you recognize a copy of the notice if shown you?

A. I would.

Q. Do you know where the original is?

A. The original I handed to the agent of the purchaser.

Mr. McClanahan: I hand you a paper and ask if you can identify it.

A. No, I can't.

Mr. McClanahan: I hand you another paper and ask if you can identify it.

A. Yes, this is a copy of the notice that I read immediately preceding this sale, and immediately after the sale. I read it twice.

Q. Who did you read it to immediately following the sale?

A. Immediately following the sale——

Mr. Cathcart: I object to that as incompetent, irrelevant and immaterial as to what he did after the sale?

Q. Who did you read it to after the sale?

Thereupon the following occurred:

Mr. Cathcart: I object to that as incompetent, irrelevant and immaterial as to what he did after the sale.")

Mr. CATHCART: I insist on that objection.

13 Mr. McCLANAHAN: It is part of the *res gestæ*.

The COURT: Objection overruled.

Mr. CATHCART: Exception.

Said ruling of the court being duly excepted by defendant, the same is here and now assigned as error by said defendant.

Thereupon the answer of Alexander Lindsay, Jr., was read in evidence as follows:

A. To Robert W. Shingle, who had bid in the place and when the place was knocked down that he had purchased for C. J. Hutchins, Trustee.

14 Exception No. IX.

Thereupon the following occur-ed:

Mr. McCLANAHAN: I call upon the defendant to produce the minutes.

We now tender, for the benefit of whom it may concern, bonds numbered one to 76——

The COURT: These are the bonds——

Mr. McCLANAHAN: Of the Kona Sugar Co., Ltd., each in the sum of $500, held by us heretofore as collateral security.

We also tender, for whom it may concern, the note of the Kona Sugar Co., Ltd., in the sum of $37,044.53.

Mr. CATHCART: We object on the ground that it is incompetent, irrelevant and immaterial. I suppose the purposes of this tender are that the plaintiff is treating this contract as an executory sale and they are claiming that they have re-cinded it, are making the tender so as to restore the Kona Sugar Co., to the *statute in quo*. The tender should have been made at the time of the re-cission of the sale—re-cission of the executory agreement to sell, whenever that was; and further it is incompetent, irrelevant and immaterial because the full tender of the consideration passed on this executory agreement to sell has not been tendered into court. There is $10,000. that they admitted to have received. (Argument.)

The COURT: Objection overruled.

Mr. CATHCART: Exception. Stenographer's Notes p. 14-15.

Said exception was then and there allowed by said court and said ruling of the said court is here and now assigned as error by said defendant.

15 Exception No. X.

Thereafter one Henry Smith having been called as a witness for the plaintiff and being duly sworn to testify in said cause, the following occurred:

Mr. McCLANAHAN: I suppose that it is admitted that Mr. Smith is Clerk of the Judiciary Department?

Mr. CATHCART: Yes.

The WITNESS: The question is, "I hand you a book and ask you whose property it is?" It belongs to the Supreme Court Judge. "In whose possession has it at this time been taken from?" It was in my

possession as Librarian of the Supreme Court. "Who was it received from when it came into the custody and possession of the Court?" It came in my possession. "Who from?" The Secretary of State of Louisiana.

Mr. McCLANAHAN: That is all. I offer——

The WITNESS: I will qualify. It so happens that this state we are treating only with the Secretary of State. There are other states I treat with the Secretary of State, or a Clerk of court, or a state librarian, but in this case, Louisiana, is the Secretary of State, is the only officer who sends to me and I send to him in exchange, so——

Mr. McCLANAHAN: I offer in evidence Act 36 of the regular session of the general—of the Acts and Resolutions passed by the General Assembly of the State of Louisiana, begun and held at the City of Baton Rouge on the 14th day of May, A. D. 1888, and which adjourned on Thursday the 12th day of July, A. D. 1888 and identified by the witness, being the Act under which this corporation received its charter.

16 Mr. CATHCART:

Q. When did you receive this book?

A. It is stated on the leaflet, October 19th, 1901, I received five or six other books besides this at the time.

Mr. McCLANAHAN: That's all, I have offered it.

Mr. CATHCART: I object on the ground that it is incompetent irrelevant and immaterial; that it is not proof of anything—of any law under which this company is incorporated so far as I can see, to show what the law is relative to the incorporation of companies in the State of Louisiana, of corporations in the State of Louisiana.

Mr. McCLANAHAN: It is offered to show the law under which this company was incorporated. It certainly shows a *de facto* corporation. Whether the law was complied with or not it shows a *de facto* corporation.

(Argument.)

The COURT: This is in evidence anyway, the law. The court will receive it as far as it goes.

Mr. CATHCART: Exception.

The COURT: Of course it don't yet say that it establishes the fact of corporation.

Stenographer's Notes p. 20-21.

Said exception was then and there allowed by said court and said ruling of the court is here and now assigned as error by said defendant.

Exception No. XI.

Thereafter during the progress of said trial one W. W. Bierce was called as a witness in behalf of the plaintiff and having been duly sworn the following occur-ed in reference to the incorporation of plaintiff:

17 Mr. McCLANAHAN:

Q. Has W. W. Bierce, Ltd., acted or not as a corporation?

Mr. CATHCART: I object to it as incompetent, irrelevant and immaterial, not the best evidence to show any incorporation.

The COURT: "Acted", you are speaking generally.

Mr. McCLANAHAN: Yes, sir.

The COURT: Objection overruled.

Mr. CATHCART: Exception. Stenographer's Notes p. 30.

Said exception was then and there allowed by said court and said ruling of the court is here and now assigned as error by said defendant.

And thereupon the following occurred:

The COURT: Understand the ruling though. I do not yet hold that that proves the corporation. I think it is admissible.

A. We have acted as a corporation entirely since our corporate papers were taken out and having done business in nearly all countries.

The COURT: What date was that Mr. Bierce?

A. 23rd of December, 1899.

Q. Since that date you have acted as a corporation?

A. Yes, entirely so.

Stenographer's Notes p. 30.

Said exception was then and there allowed by said court and said ruling of the court is here and now assigned as error by said defendant.

Exception No. XII.

Immediately thereafter and in reference to the proof of the incorporation of plaintiff, the following occur-ed:

18 Mr. McCLANAHAN: If the court pleases, it is proper at this stage of the proceedings, we can and are now prepared to ask the question, which has not been brought up except in a dilatory way before, as to whether this defendant can raise this question or not.

(Argument.)

The COURT: What I want to know is whether Mr. Hutchins would be estopped because the Kona Sugar Co., is estopped.

(Argument.)

The COURT: My view is in the light of the argument and authorities cited, that the defendant, Mr. Hutchins, is estopped by reason of the dealings of the Kona Sugar Co., with the plaintiffs as a corporation, and that he cannot now be heard to deny their corporate existence.

Mr. CATHCART: An exception to the ruling of the court.

Stenographer's Notes p. 30-31.

Said exception was then and there duly allowed by said court and said ruling of the court is here and now assigned as error by said defendant.

19 Exception No. XIII.

Upon the plaintiff having rested its case defendant moved to strike out the answer to interrogatory No. 40 propounded to Columbus Bierce and read in evidence in plaintiff's case, said interrogatory and answer being as follows:

Interrogatory 40th. If in answer to the last preceding interrogatory you have stated, among other things, that during the middle and latter part of the year 1902 you were informed by your attorneys in Honolulu, Messrs. Kinney, Ballou & McClanahan, that they, acting as your attorneys, had given notice of a claim of lien, and *has* subsequently instituted an action on said lien against the rails, engines, cars and other railroad equipment referred to in the preceding interrogatories, which were at that time in the possession of the Kona Sugar Company, Limited, state what information or belief, if any, William W. Bierce, Limited, had, at the time they were notified that a lien had been filed in regard to the rights of the Kona Sugar Company, Limited, in and to the land over which the plantation railroad ran.

Answer to Interrogatory 40th. At the time William W. Bierce, Limited, were informed by Messrs. Kinney, Ballou & McClanahan that they had filed a mechanic's lien claim in our behalf, as stated in my answer to the last preceding interrogatory we had considerable information which seemed to point conclusively to the fact that the Kona Sugar Company, Limited, owned the land on which the rails, cars, locomotives, scales and other material supplied by us, as stated in my answer to the foregoing interrogatory, had been installed and used in operating the plantation railroad of the Kona Sugar
20 Company, Limited. This information consisted of statements made to us verbally by Mr. Frank Davies and Mr. Harry T. Gilbert, after they had visited the Islands as our representatives, to the effect that the goods in question were to be used in building, constructing and operating the railroad of the Kona Sugar Company, Limited, on the Kona plantation of the Company, and later that the same had been so used and that the Kona Sugar Company, Limited, was operating this railroad on and as an essential part of a large Sugar plantation located in Kona District, in the Island of Hawaii, of which plantation it was the owner. We received like information from time to time from Messrs. Kinney, Ballou & McClanahan, and under all the circumstances it was a reasonable and necessary inference on our part that the Kona Sugar Company, Limited, either held the title in fee simple to the land on which the plantation railroad was constructed or held a long term written lease thereof, or had otherwise acquired a satisfactory title to the land in the shape of a written conveyance of right of way or equivalent rights and title by condemnation proceedings, which is a usual and familiar mode of acquiring title to land for use as a railroad right of way in all parts of the United States.

And thereupon the following occurred:

Mr. CATHCART: At this time I desire to make a motion to strike out of the evidence certain portions of the deposition of W. W. Bierce—of Columbus Bierce—which was read in the early part of yesterday during the trial. The question is contained in the 40th interrogatory, in which it reads as follows: "If, in answer to the last preceding interrogatory you have stated, among other things, that during the middle * * * ran." I objected to that as being
21 incompetent, irrelevant and immaterial. The court overruled my objection. The answer was read and I moved to strike it out. I think at the time, the court held, however, that he would allow it to remain in for the time being until it was connected up and made material by the plaintiff. Now I base this motion more particularly upon the ground that it is shown by his preceding answer to interrogatory 39 that the Bierce Co. turned the matter, the note and the collateral and agreements "referred to in my testimony (reads) * * * as they might deem advisable under all the circumstances." (Argues.) So it shows, according to Columbus Bierce's own testimony that this whole matter was placed unreservedly in the hands of Kinney, Ballou & McClanahan who were on the scene of action. Now if that is so, it also appears in the testimony—by the testimony of Mr. W. W. Bierce, that this same firm not only were their attorneys at law but were their attorneys in fact. If these things were so, then it is absolutely immaterial what W. W. Bierce—what information they had relative to the rights of the Kona Sugar Co., Ltd., in the land. (Argues.)

The COURT: Well I think that the understanding between principal and agent, while the matter may be left, broadly speaking, entirely to the agent, still the principal does not give up his control and management of the affairs, and I think that we must presume, that they consult together and advise together. A principal may offer some suggestion, perhaps. Therefore the motion to strike will be denied.

Mr. CATHCART: I save an exception to the ruling of the court. (Stenographer's Notes p. 75-76.)

Said defendant duly excepted to the ruling of the court, and said ruling is here and now assigned as error by said defendant.

22 Exception No. XIV.

Immediately thereafter defendant moved to strike out the answer to interrogatory No. 41 of the said Columbus Bierce said interrogatory and answer being as follows:

Interrogatory 41st. State what information or belief, if any, William W. Bierce, Limited, had at the time they were notified that an action had been begun on said lien against the railroad equipment, etc., referred to in the last preceding interrogatory.

Answer to Interrogatory 41st. At the time William W. Bierce, Limited, were informed that an action had been begun to enforce such mechanic's lien, in its belief, against the railroad and railroad

equipment referred to in the last preceding interrogatory and my answer thereto, they had the same information and belief as mentioned in my answer to the last preceding interrogatory.

Thereupon the following occurred:

Mr. CATHCART: I make a like motion in reference to Interrogatory 41 and the answer to interrogatory 41. (Reads.)

The COURT: Well the same ruling of the court applies.

Mr. CATHCART: An exception, if the court please.

(Stenographer's Notes p. 76.)

Said ruling of the court was duly excepted to by defendant and the same is here and now assigned as error by said defendant.

23 Exception No. XV.

Thereafter and during the progress of said trial the witness M. F. SCOTT was called in behalf of said defendant, and being duly sworn to testify in said cause, the following occurred:

Mr. CATHCART:

Q. Are you familiar with the material constituting the railway down there, rolling stock, rails, etc.?

A. Yes, I am quite familiar with it.

Q. Can you state what is the condition of the railway material, including all rolling stock, the rails, etc.?

Mr. McCLANAHAN: I object to that. If it is an attempt to prove the value of the rolling stock I submit that this witness is not qualified as an expert to prove the condition or prove the value by showing its condition.

Mr. CATHCART: I am not trying to prove the value.

Mr. McCLANAHAN: Well then it is immaterial.

Mr. CATHCART: It is material as to deterioration.

Mr. McCLANAHAN: This witness has not qualified to testify as to the deterioration of railway material.

The COURT: Objection sustained.

Mr. CATHCART: Exception. (Stenographer's Notes p. 79.)

Said exception was then and there duly allowed by said court and said ruling of the court is here and now assigned as error by said defendant.

Exception No. XVI.

Immediately thereafter and as a continuation of the testimony taken and proceedings had, which are set out in the preceding exception, the following occurred:

Mr. CATHCART:

Q. Now state, if you can, what, if any, difference there is
24 in the material, its appearance and, for instance, whether the rails appear more worn, whether the engines work less well now that on the day we took possession of it.

Mr. McCLANAHAN: I object to that, not having laid the foundation for testifying as an expert.

The COURT: Objection sustained.

Mr. McCLANAHAN: I ask the court instead of maintaining my objection to grant my motion to strike out the answer of Mr. Scott. There is a motion to strike.

The COURT: Very well the motion then will be granted.

Mr. CATHCART: Exception. (Stenographer's Notes p. 82.)

Said exception was then and there duly allowed by said court and the ruling of said court is here and now assigned as error by said defendant.

Exception No. XVII.

At the conclusion of the trial of said cause and before rendition of judgment therein the defendants moved for judgment and the following proceedings were had and occur-ed:

Mr. CATHCART: I will make now a motion for judgment for the defendant on the ground that it appears from the evidence in the case that this was not a conditional sale as claimed by the plaintiff but was a chattel mortgage; on the ground that if it was a conditional sale, then the plaintiff by this action has elected to treat it as an absolute sale and is not entitled to recover the property in this action by a suit of replevin.

The COURT: The motion will be denied.

(Stenographer's Notes p. 82.)

To which ruling of the court the defendant then and there excepted and said exception was duly allowed, and said ruling
25 of said court is here and now assigned as error by said defendant.

Exception No. XVIII.

Thereafter and at the conclusion of argument by counsel for plaintiff and for defendant, the court found judgment in favor of the plaintiff and against the defendant and the following proceedings were had and oc:ur-ed:

The COURT: I therefore find judgment for plaintiff to recover the property as set forth in the complaint and upon failure to so recover it to be entitled to recover its value which I find to have been $22,000. on the first day of June, 1901, and by way of damages recover interest on the said sum of $22,000. at the rate of six per cent. from the first day of June, 1901, up to the date of the judgment. Of course costs and all. Mr. McClanahan you can prepare what you consider the necessary facts leading to this conclusion and counsel may present them and I will give you a hearing upon them if you see fit.

Mr. CATHCART: The court will allow me to except to the judgment of the court as being contrary to the law and evidence and against the weight of evidence, and give notice of motion for new trial.

The COURT: Exception is noted.

(Stenographer's Notes p. 85-86.)

Said exception was then and there allowed by said court and the ruling of said court is here and now assigned as error by said defendant.

Exception No. XIX.

Thereafter and in pursuance of the direction of the court the plaintiff presented to said court certain Findings of Fact and Con-
26 clusions of Law, to which objections were made by said defendant, and thereupon the following proceedings were had:

Mr. MILVERTON: In the Bierce case I would like to have the firm of Catheart & Milverton to be entered as attorneys for the defendant in the place of J. W. Catheart.

The COURT: It is so ordered.

(Findings of Fact read, also Conclusions of Law.)

Mr. MILVERTON: May it please the court in view of the fact that most of the questions raised by these objections have been at some time during the progress of the trial passed upon by your Honor I do not intend to make any argument upon them, but merely present them and possibly make some slight argument as to some new points that are now raised for the first time. The objections to the findings of fact are as follows: (Reads first objection.)

The COURT: Will we dispose of the objections as we go along?

(Stenographer's Notes p. 90.)

Plaintiff proposed the following finding:

That on March 13th 1901, plaintiff and the Kona Sugar Company, Limited, entered into the contract of that date attached to plaintiff's complaint as Exhibit "A".; to which defendant objected as follows:

Defendant objects to the 3rd proposed finding of fact upon the ground that the evidence in said action shows that the contract therein referred to was a supplementary contract merely.

Said objection was by said court overruled and the defendant duly excepted to the ruling of the court, and the said ruling of the court is here and now assigned as error by said defendant.

27 Exception No. XX.

Immediately thereafter plaintiff proposed the following finding:

That the payment of $10,000 under the contract of March 13th, 1901, and the giving of the note for $37,044.53 secured by the bonds of the Kona Sugar Company, Limited, was intended to be and was in settlement of the contract of February 21st, 1900, and said cash and said note and bonds were not given nor were they intended as the consideration for the purchase price of the materials sued for; to which finding the defendant objected as follows:

Defendant objects to the 4th proposed finding of fact upon the ground that the evidence in said action shows that the so called contract of March 13th 1901, and the giving of securities in connection therewith, was intended to be in settlement of the terms of payment of the contract of February 23rd 1900, and not in settlement of the contract itself, and that the cash, note and bonds referred to were

intended to be and were given as payment for the purchase price of the material sued for.

The court then and there overruled said objection to which ruling of the court said defendant then and there excepted and said ruling is here and now assigned as error by said defendant.

Exception No. XXI.

Immediately thereafter plaintiff proposed the following finding:

That the condition precedent, the performance of which was to divest the plaintiff of title to the property sued for, was in-
28 tended by the parties to be the payment of the note of $37,-044.53 given in settlement of the contract of February 21st, 1900; to which ruling the defendant objected as follows:

Defendant objects to the 5th proposed finding of fact upon the ground that the evidence adduced shows that the payment of the said note of $37,044.53 was not a condition precedent, the performance of which was to divest the plaintiff of the title to the property sued for.

The court then and there overruled said objection to which ruling of the court the said defendant then and there excepted and said ruling is here and now assigned as error by said defendant.

Exception No. XXII.

Immediately thereafter plaintiff proposed the following finding:

That the contract of March 13th, 1901, was an entire contract and intended so to be, for a lump sum consideration which consideration was incapable of being appointed so as to make possible the ascertainment of the price of the lienable and non-lienable items thereof;

C. & M. to which finding the defendant [excepted]* as follows: objected

Defendant objects to the 6th proposed finding of fact upon the ground that said so-called finding contains mixed questions of law and fact, and upon the further ground that the evidence in said cause shows that the said contract of March 13th, 1901, was not an entire contract, nor intended so to be, but was a contract supplementary to the contract of February 21st, 1900.

The court then and there overruled said objection to which ruling of the court said defendant then and there duly excepted and
29 said ruling is here and now assigned as error by said defendant.

Exception No. XXIII.

Immediately thereafter plaintiff proposed the following finding:

That by entering into the contract of March 13th, 1901, the contract of February 21st, 1900, was intended to be settled and adjusted; to which finding the defendant objected as follows:

[*Word enclosed in brackets erased in copy.]

Defendant objects to the 7th proposed finding of fact upon the ground that the same is ambiguous and unintelligible.

The court then and there overruled said objection to which ruling of the court said defendant then and there duly excepted, and said ruling is here and now assigned as error by said defendant.

Exception No. XXIV.

Immediately thereafter plaintiff proposed the following finding: That both the plaintiff and the Kona Sugar Company, Limited, intended said contract of March 13th, 1901, to operate as a conditional sale of the property sued for and not as a chattel mortgage, or an absolute sale with lien reserved in the vendor; to which finding or an absolute sale with lien reserved in the vendor; to which finding

objected

C. & M. the defendant [excepted]* as follows:

Defendant objects to the 8th proposed finding of fact upon the ground that the same is not supported by the evidence in said action.

The court then and there overruled said objection to which ruling of the court said defendant then and there duly excepted, and said ruling is here and now assigned as error by said defendant.

30

Exception No. XXV.

Immediately thereafter plaintiff proposed the following finding: That in view of all the circumstances of the case said contract of

conditional

March 13th, 1901, was a [confidential]* sale and not a chattel mortgage, or absolute sale with lien reserved in the vendor; to which finding the defendant objected as follows:

Defendant objects to the 9th proposed so-called finding of fact upon the ground that the same is a mere conclusion of law.

The court then and there overruled said objection to which ruling of the court said defendant then and there duly excepted, and said ruling is here and now assigned as error by said defendant.

Exception No. XXVI.

Immediately thereafter plaintiff proposed the following finding: That some of the property sued for in said action, including railroad rolling stock, was not in fact used in the construction of the railway of the Kona Sugar Company, Limited, and was not lienable; to which finding the defendant objected as follows:

Defendant objects to the 10th proposed finding of fact upon the ground that the same is contrary to and is not supported by the evidence in said action.

The court then and there overruled said objection to which ruling of the court said defendant then and there duly excepted, and said ruling is here and now assigned as error by said defendant:

[*Words enclosed in brackets erased in copy.]

31 Exception No. XXVII.

Immediately thereafter plaintiff proposed the following finding: That plaintiff did not at any time intend to, nor did it in fact waive its title to the property sued for, nor did it intend to, or in fact make any election of remedies or rights so as to bar the bringing of this action; to which finding the defendant objected as follows:

Defendant objects to the 11th proposed finding of fact upon the ground that the same contains mixed questions of law and fact, and upon the further ground that the same is not supported by the evidence in said action.

The court then and there overruled said objection to which ruling of the court said defendant then and there duly excepted, and said ruling is here and now assigned as error by said defendant.

Exception No. XXVIII.

Immediately thereafter plaintiff proposed the following finding: That plaintiff did not intend to and did not in fact waive its title by bringing the action to enforce a material man's lien against the Kona Sugar Company, Limited, and its Receiver; to which finding the defendant objected as follows:

Defendant objects to the 12th proposed finding of fact upon the ground that the same is not supported by the evidence in said action.

The court then and there overruled said objection to which ruling of the court said defendant then and there duly excepted, and said ruling is here and now assigned as error by said defendant.

32 Exception No. XXIX.

Immediately thereafter plaintiff proposed the following finding: That the acts of the plaintiff prior to the bringing of this action did not amount to a re-cission of the contract of March 13th, 1901, and said contract as a matter of fact has not been re-cinded; to which finding the defendant objected as follows:

Defendant objects to the 13th proposed so-called finding of fact upon the ground that the same is a mere conclusion of law.

The court then and there overruled said objection to which ruling of the court said defendant then and there duly excepted, and said ruling is here and now assigned as error by said defendant.

Exception No. XXX.

Immediately thereafter plaintiff proposed the following finding: That the defendant attempted to purchase and did in fact take possession of the articles sued for, with knowledge both record and actual, of plaintiff's claim and title thereto; to which finding the defendant objected as follows:

Defendant objects to the 14th proposed finding of fact upon the ground that the same is not supported by the evidence in said action.

The court then and there overruled said objection to which ruling of the court said defendant then and there duly excepted, and said ruling is here and now assigned as error by said defendant.

33 Exception No. XXXI.

Immediately thereafter plaintiff proposed the following finding:

That the actual value of said articles sued for was at the time of bringing this action and now is, the sum of $22,000; to which finding the defendant objected as follows:

Defendant objects to the 15th proposed finding of fact upon the ground that the value of the articles sued for in said action, and fixed in said finding in the sum of $22,000 is in excess of the amount actually claimed by the plaintiff in its complaint and affidavit herein, and upon the further ground that said finding does not set out the separate value of each different article comprising the property referred to in said finding.

And after the reading of the last above mentioned objection the following occurred:

Mr. McCLANAHAN: Then we now move to amend the complaint in substituting $22,000 for $20,000 wherever the same appears in the complaint.

The COURT: It is so ordered. The amendment will be made to conform with the proof.

Mr. MILVERTON: At this time in order to save the point we object to any such amendment being made, claiming that it it too late, and except to the ruling of the court.

The COURT: And the other objection made Mr. Milverton, I don't think that is well taken,—that each separate article should be set out—therefore the objection will be overruled.

Mr. MILVERTON: Exception.

(Stenographer's Note p. 92.)

34 The court then and there overruled said objection to which ruling of the court said defendant then and there duly excepted, and said ruling is here and now assigned as error by said defendant.

Exception No. XXXII.

Upon the hearing of said 15th proposed finding of fact just above referred to in the foregoing Exception No. — the following occurred:

Mr. McCLANAHAN: Then we now move to amend the complaint in substituting $22,000 for $20,000 wherever the same appears in the complaint.

The COURT: It is so ordered. The amendment will be made to conform with the proof.

Mr. MILVERTON: At this time in order to save the point we object to any such amendment being made, claiming that it is too late, and except to the ruling of the court.

The COURT: And the other objection made Mr. Milverton, I don't thing that it is well taken,—that each separate article should be set out,—therefore the objection will be overruled.

Mr. MILVERTON: Exception. (Stenographer's Notes p. 92.)
To which ruling of the court allowing said amendment to the complaint, the defendant duly excepted, and said ruling is here and now assigned as error by said defendant.

Exception No. XXXIII.

Immediately thereafter plaintiff proposed the following finding:
That plaintiff has suffered damages from defendant's detention of the property in the sum of $1,045.00 being interest at six
35 per cent. on said sum of $22,000. from June 1st 1903 to the date of judgment herein: to which finding the defendant objected as follows:
Defendant objects to the 16th proposed finding of fact upon the ground that the evidence in said action does not show that the plaintiff suffered damages by reason of the defendant's alleged detention of said property in the sum of $1,045. or in any other sum.
The court then and there overruled said objection to which ruling of the court said defendant then and there duly excepted, and said ruling is here and now assigned as error by said defendant.

Exception No. XXXIV.

Immediately thereafter plaintiff proposed the following finding:
That each and every material allegation in plaintiff's complaint, save as hereinabove qualified, has been established by the evidence, to which finding the defendant objected as follows:
Defendant objects to the 17th proposed finding of fact upon the ground that the same is indefinite, ambiguous and unintelligible.
And the following proceedings were had:
Mr. MCCLANAHAN: We move to strike out "save as hereinabove qualified" and leave it that every material allegation has been proven.
Mr. MILVERTON: But we claim that that is not a proper finding of fact.
The COURT: I think by striking out the words suggested there by Mr. McClanahan that then it will be quite clear. Of course
36 I don't know that it helps any, but I am not sure that it hurts anything. The words "save as hereinabove qualified" are stricken out.
Mr. MILVERTON: Exception to your Honor's ruling, and except to each and every ruling upon the objections to the proposed findings of fact.
The COURT: Exceptions may be noted.
(Stenographer's Notes p. 92-93.)
An exception having been duly taken to the ruling of said court, said ruling is here and now assigned as error by said defendant.

Exception No. XXXV.

Thereupon the following occurred in relation to defendant's objection to the plaintiff's proposed Conclusions of Law. Plaintiff proposed the following conclusion of law:

That the defendant is not in a position to be able to deny or require proof of plaintiff's corporate existence; to which conclusion defendant objected as follows:

Defendant objects to the first proposed conclusion of law upon the ground that the same is not based upon any finding of fact herein, nor upon any evidence in said action and is contrary to law, and upon the further ground that the same is vague, indefinite, ambiguous and unintelligible.

The court then and there overruled said objection to which ruling of the court said defendant then and there duly excepted, and said ruling is here and now assigned as error by said defendant.

37 Exception No. XXXVI.

Immediately thereafter plaintiff proposed the following conclusion of law:

That the contract of February 21st, 1900, was adjusted and settled between the parties by the contract of March 13th, 1901; to which conclusion the defendant objected as follows:

Defendant objects to the 2nd proposed conclusion of law upon the ground that the same is vague, indefinite, ambiguous and unintelligible.

The court then and there overruled said objection to which ruling of the court said defendant then and there duly excepted, and said ruling is here and now assigned as error by said defendant.

Exception No. XXXVII.

Immediately thereafter plaintiff proposed the following conclusion of law:

That the contract of March 13th, 1901, between plaintiff and the Kona Sugar Company, Limited, was a conditional sale and not a chattel mortgage or absolute sale with lien reserved in the vendor, and under it plaintiff held title to the property sued for; to which conclusion the defendant objected as follows:

Defendant objects to the 3rd proposed conclusion of law upon the ground that the same is not based upon any finding of fact, and is not supported by the evidence in said action, and upon the further ground that said conclusion is contrary to law.

The court then and there overruled said objection to which
38 ruling of the court said defendant then and there duly excepted, and said ruling is here and now assigned as error by said defendant.

Exception No. XXXVIII.

Immediately thereafter plaintiff proposed the following conclusion of law:

That the payment of $10,000 under the contract of March 13th, 1901, and the giving of the note therein for $37,044.53 secured by the bonds of the Kona Sugar Company, Limited, was in settlement and adjustment of the contract of February 21st, 1900, and neither

said cash or said note and bonds were given as a consideration for the purchase price of the materials sued for; to which conclusion the defendant objected as follows:

Defendant objects to the 4th proposed conclusion of law upon the ground that the same is not supported by any finding of fact herein, nor by the evidence in said action, and is contrary to law.

The court then and there overruled said objection to which ruling of the court said defendant then and there duly excepted, and said ruling is here and now assigned as error by said defendant.

Exception No. XXXIX.

Immediately thereafter plaintiff proposed the following conclusion of law:

That the condition precedent, the performance of which was to divest the plaintiff of title for the property sued for, was the payment of the note of $37,044.53 which had been given as one of the considerations for the settlement of the contract of February 21st, 1900; to which conclusion the defendant objected as follows:

39 Defendant objects to the 5th proposed conclusion of law upon the ground that the same is not supported by any finding of fact herein, nor by the evidence in said action, and upon the further ground that said conclusion is vague and indefinite and is contrary to law.

The court then and there overruled said objection to which ruling of the court said defendant then and there duly excepted, and said ruling is here and now assigned as error by said defendant.

Exception No. XL.

Immediately thereafter plaintiff proposed the following conclusion of law:

That the contract of March 13th, 1901, was an entire contract for a lump sum consideration and contained lienable and non-lienable items; to which conclusion the defendant objected as follows:

Defendant objects to the 6th proposed conclusion of law upon the ground that the same is not supported by the evidence in said action, and is contrary to law.

The court then and there overruled said objection to which ruling of the court said defendant then and there duly excepted, and said ruling of the court is here and now assigned as error by said defendant.

Exception No. XLI.

Immediately thereafter plaintiff proposed the following conclusion of law:

That the plaintiff has made no election of either remedies or rights so as to bar the bringing and maintaining of this action; to which conclusion the defendant objected as follows:

40 Defendant objects to the 7th proposed conclusions of law upon the ground that the same is not supported by any find-

ing of fact herein, nor by the evidence in said action, and is contrary to law.

The court then and there overruled said objection to which ruling of the court said defendant then and there duly excepted, and said ruling is here and now assigned as error by said defendant.

Exception No. XLII.

Immediately thereafter plaintiff proposed the following conclusion of law:

That plaintiff is entitled to judgment against the defendant for the return of the property sued for and damages for its detention, and in the event of defendant's inability to return the said property, plaintiff is entitled to judgment for $22,000 its value, and also damages for its detention; to which conclusion defendant objected as follows:

Defendant objects to the 8th proposed conclusion of law upon the ground that the same is not supported by any finding of fact, nor by the evidence in said action, and upon the further ground that this court is without authority to render a money judgment herein, and upon the further ground that the defendant is entitled to have the judgment in said action show the separate value of each of the different articles comprising the property ordered and adjudged by the decision of this court to be returned by this defendant to said plaintiff.

The court then and there overruled said objection to which ruling of the court defendant then and there duly excepted and said ruling is here and now assigned as error by said defendant.

41 Exception No. XLIII.

Thereupon the plaintiff presented to the court the following decision:

In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, December, 1903, Term.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Decision.

The court having heard the above entitled cause does hereby find for the plaintiff for the recovery of the following property:

362 tons of steel T rails weighing 35 pounds to the yard.
Joints for laying 550 tons of steel T rails.
Railroad track spikes to lay 550 tons of said rails.
10 set of 35 pound split switch material, complete.

16 railway cars 25 feet long, 7 feet wide for 3 ft. gauge track.
One 9x14 class "A" saddle tank locomotive.
One 10x16 back saddle tank locomotive.
One Howe Narrow Gauge track scale, capacity 25 tons.
One set re-railers.
Four track gaugers, 3 feet.
One rail bender.
One track drill.
One section car with seats.
Two Jacks.

Together with damages for its detention from the 1st day of June, 1903, to the date hereof, and in the event of the inability and failure of the defendant to forthwith make return of said property to
42 the plaintiff, that the plaintiff shall have judgment for the value of said property found to be the sum of $22,000. and damages for its detention from the 1st day of June, 1903, found to be the sum of $1,045. and the costs of this action.

Dated, Honolulu, March A. D. 1904.

____ ____,
First Judge of the Circuit Court
of the First Judicial Circuit.

And the following proceedings were had and occur-ed:

Mr. McCLANAHAN: I present now to the court the decision in this case, filed the other day, filed with the bill of costs. Counsel have had notice and copy of the decision.

Mr. MILVERTON: We object to the decision and the signing of the same upon the ground that it is not supported by the evidence in the case and as contrary to law, and upon the further ground that the court has no authority to order an alternative judgment in said case, and upon the further ground that the decision should set forth the separate value of the different articles claimed by the plaintiff in this action.

The COURT: Objection overruled.

Mr. MILVERTON: Exception.

Stenographer's Notes 94.

To which ruling of the court the defendant then and there duly excepted, and said ruling of the court is here and now assigned as error by said defendant.

Exception No. XLIV.

And thereupon said plaintiff presented to said court the following judgment:

43 In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, December, 1903, Term.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Judgment.

This cause by stipulation of parties and consent of the above entitled court coming on regularly to be heard at the January 1904 Term of the Circuit Court of the First Judicial Circuit, before the Honorable John T. De Bolt, on the 7th day of March, A. D. 1904, and by stipulation of parties and consent of court a jury having been waived and the above named plaintiff being present represented by its attorneys Messrs. Kinney, McClanahan & Cooper, and the above named defendant being present represented by his attorneys John W. Cathcart, Esq., and Messrs. Castle & Withington, and said cause proceeding to trial on said last named day and continuing until Saturday the 12th day of March, 1904 and the court having heard the evidence adduced by the respective parties and being fully advised in that respect and argument having been made by the respective counsel, and the court being advised in all ways in the premises and having at the close of said argument rendered a decision in favor of the plaintiff and against the defendant for the return of the property sued for in said action together with damages for its detention from the 1st day of June 1903, to the date hereof, or in default to
44 make return of said property that said plaintiff recover the value thereof shown to be the sum of $22,000 together with damages as aforesaid for its detention;

Now Therefore, it is ordered and adjudged that the above named defendant Clinton J. Hutchins, Trustee, forthwith return into the possession of William W. Bierce, Limited, or its authorized agent or attorneys the following described personal property, now in the possession of the said defendant:

362 tons of steel T rails weighing 35 pounds to the yard.
Joints for laying 350 tons of steel T rails.
Railroad track spikes to lay 550 tons of said rails.
10 set- of 35 pound split switch material, complete.
16 railway cars 25 feet long, 7 feet wide, for 3 ft. guage track.
One 9 x 14 class "A" saddle tank locomotive.
One 10 x 16 back saddle tank locomotive.
One Howe Narrow Guage track scale, capacity 25 tons.
One set re-railers.
Four track guagers, 3 feet.
One rail bender.
One track drill.
One section car with seats.
Two Jacks.

and that said William W. Bierce, Limited, do have and recover from said Clinton J. Hutchins, Trustee, the sum of $—— as damages for the detention of said property from the 1st day of June, 1903, to the date hereof, together with the costs of this action taxed at the sum of $——.

And it is further ordered and adjudged that on failure of the said defendant Clinton J. Hutchins, Trustee, to forthwith make such return of said property to the possession of said plaintiff; that the said plaintiff William W. Bierce, Limited, have and recover from the said defendant Clinton J. Hutchins, Trustee, the value of said property found and adjudged herewith to be the sum of $22,000 together with damages for its detention from the 1st day of June, 1903, to
45 the date hereof and adjudged to be the sum of $1,045.00 together with the costs of this action taxed at the sum of $——.

Witness the Honorable John T. De Bolt, First Judge of the Circuit Court of the First Judicial Circuit.

Dated, March —, 1904.

By the Court:

—— ——, *Clerk.*

Whereupon the following occurred:

Mr. McLANAHAN: We have now if your Honor please, a judgment in this case.

Mr. MILVERTON: I object to the entering or rendering of a judgment on the ground that the same is contrary to the law and the evidence and the weight of the evidence, and upon the further ground that the court has no authority to render an alternative judgment or money judgment in an action of this character, and upon the further ground that the judgment should show the separate value of the different articles sued for and made the basis of this claim.

The COURT: Well, the objection overruled.

Mr. MILVERTON: Exception. (Stenographer's Notes p. 94-95.)

To which ruling of the court an exception was duly taken by said defendant, and said ruling is here and now assigned as error by said defendant.

Exception No. XLV.

And the judgment having been thereupon signed and entered, the following occur-ed:

Mr. MILVERTON: After the signing of the judgment we
46 again except to the judgment as contrary to law and the evidence and the weight of evidence.

Mr. CATHCART: And give notice of motion for a new trial. (Stenographer's Notes p. 95.)

And said defendant here and now assigns as error the signing and entering of said judgment, as being contrary to law and the evidence and against the weight of the evidence.

Exception No. XLVI.

That thereafter and on the 23rd day of March, A. D. 1904, defendant presented his motion for new trial in words and figures following towit:

In the Circuit Court of the Third Judicial Circuit (Transferred to First Judicial Circuit), Territory of Hawaii.

WILLIAM W. BIERCE, LIMITED, Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Motion for New Trial.

Comes now Clinton J. Hutchins, Trustee, the defendant above named by his attorneys, Cathcart & Milverton, and moves this Honorable Court that the decision and judgment in the above entitled action rendered and entered on the 12th day of March, A. D. 1904, and the 19th day of March, 1904, respectively, in favor of the above entitled plaintiff and against said defendant, be set aside, and a new trial granted on the following grounds, towit:

For that the said decision and judgment were and are contrary to the law and the evidence, and the weight of the evidence, and for errors of law occurring during the trial of said action, which
47 errors were duly excepted to by said defendant and such exceptions allowed by the court.

This motion is based upon all the pleadings, papers, files and proceedings in said action, the decision of said court, the record and judgment appertaining to said action, the official stenographer's notes of the evidence and proceedings taken at the trial of the same, and the minutes of the Clerk of said court taken herein.

CLINTON J. HUTCHINS, *Trustee,*
By CATHCART & MILVERTON,
His Attorneys.

Honolulu, T. H. March 19th, 1904.

Which said motion was then and there denied and exception to the ruling of the court duly taken, and defendant here and now assigns said ruling of the court as error.

And to the end that justice and right may be done this defendant prays that this his Bill of Exceptions herein be settled, allowed and approved as true and correst in all particulars; and further prays that all records, papers, files, affidavits, exhibits, testimony, stenographer's notes, stenographer's transcript, and other papers and documents in said cause, be expressly made a part of this Bill of Exceptions and in-

corporated herein as fully and completely as if they and each of them were actually set out herein in words and figures.

Dated, Honolulu, April 15th, A. D. 1904.

(Signed) CLINTON J. HUTCHINS,
Trustee, Defendant.

(Signed) CATHCART AND MILVERTON,
CASTLE & WITHINGTON, &
W. L. WHITNEY,
Attorneys for Defendant.

48 *Order Approving Foregoing Bill of Exceptions and Incorporating Therein All Files, Records, Exhibits, and Testimony.*

In the matter of the foregoing Bill of Exceptions now duly presented in time by said defendant Clinton J. Hutchins, Trustee, it is, hereby ordered by said court that said Bill of Exceptions, being found conformable to the truth, be and the same is hereby settled, allowed and approved as true and correct in all particulars;

And it is further ordered that all records, papers, files, affidavits, exhibits, testimony, stenographer's notes, stenographer's transcript, and other papers and documents in said cause, be and they are and each of them is hereby made a part of said Bill of Exceptions, and incorporated therein as fully and completely as if they and each of them were actually set out therein in words and figures.

J. T. D. Done and dated at Honolulu, this 10th day of June [April]* A. D. 1904, as of April 19, 1904.

(Sig.) J. T. DE BOLT,
Judge of Said Court.

Endorsed: Circuit Court, Third Circuit. (Transferred to 1st Circuit) Territory of Hawaii. L. 5782. W. W. Bierce, Limited, Plaintiff, *vs.* Clinton J. Hutchins, Trustee, Defendant. Defendant's Bill of Exceptions. Filed & presented to the Court for allowance this 16th day of April 1904, at 9:40 A. M. P. D. Kellett, Jr., Clerk. Cathcart & Milverton, Attorneys for Defendant, Honolulu, T. H.

49 And on the same day, to-wit, the 10th day of June, A. D. 1904, as of the 19th day of April, A. D. 1904, there were also certified and sent up to the Supreme Court of the Territory of Hawaii, together with and as parts of the said Bill of Exceptions, all the records, papers, files, affidavits, exhibits, testimony, stenographer's notes, stenographer's transcript and other papers and documents in said cause which are mentioned in the Judge's certificate to said Bill of Exceptions, and thereby incorporated in and made parts of said Bill of Exceptions, and which now remaining on file and of record in the office of the Clerk of said Supreme Court are in the words and figures following, to-wit:

[*Word enclosed in brackets erased in copy.]

The plaintiff's complaint filed in said cause and the amendments thereof, the affidavit verifying said complaint, the exhibits thereto attached, the term summons issued in said cause and return of service thereon endorsed, the affidavit for replevin and the Deputy Sheriff's certificate of levy upon and release of property in said cause, all attached together and all returned and filed in the office of the Clerk of said Circuit Court of the Third Judicial Circuit on the first day of August, A. D. 1903, which are in the words and figures following, to-wit:

50 In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, December, 1903, Term.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee, Defendant.

Stamped $2.00.

Replevin.

Complaint.

Now comes William W. Bierce, Limited, plaintiff herein, by its attorneys Kinney & McClanahan, and complains of Clinton J. Hutchins Trustee and for cause of action shows:

1.

That plaintiff is a corporation duly organized and existing under the laws of the State of Louisiana and having its principal place of Business in the City of Chicago in the State of Illinois.

2.

That the defendant is a resident of Honolulu, Island of Oahu, Territory of Hawaii, and a citizen of the said Territory of Hawaii.

51 3.

That on or about February 21st A. D. 1900 the said plaintiff agreed to furnish to the Kona Sugar Co., Ltd., a corporation duly organized and existing under the laws of the Territory of Hawaii, certain rails, engines, cars and other goods and merchandise for use on the plantation of the said Kona Sugar Co. Ltd. in the District of Kona, Island and Territory of Hawaii, at prices specified in the said agreement, which prices the said Kona Sugar Co. Ltd. agreed in writing to pay in cash upon the presentation of a demand draft attached to the bill of lading issued by the initial railroad, showing the said goods and merchandise to have been shipped through to the city of Honolulu, Island of Oahu, Territory of Hawaii.

4.

That in pursuance of the said agreement said plaintiff proceeded to ship the articles mentioned in said agreement to said Honolulu;

that upon shipment of said goods and merchandise demand was made upon the said Kona Sugar Co. Ltd. for the payment of the price thereof in accordance with the terms of the agreement before mentioned. That the said Kona Sugar Co. Ltd., failed, neglected and refused to pay the said price or any part thereof; that because of this said failure on the part of the Kona Sugar Co. Ltd., the said goods and merchandise were not upon their arrival at said Honolulu, nor at any other time, save as hereinafter mentioned, delivered to the said Kona Sugar Co. Ltd., nor was the title to said goods and merchandise or the right of property therein or the title or right of property of or in any part thereof ever transferred or taken from plaintiff,

52 but that plaintiff retained both the title and possession and the right to the possession of the said goods and merchandise and each and all of them and every part thereof, and refused to permit them or any of them to pass into the possession of the said Kona Sugar Co. Ltd., except as hereinafter stated, nor did they or any of them in fact pass into the possession of the Kona Sugar Co. Ltd., except as hereinafter stated.

Amendment allowed by the Court, this 7th day of March, 1904. P. D. Hellett, Jr., Clerk.

That thereafter, to wit on or about March 13th 1901, [a supplementary said agreement of February 2, 1900, was adjusted and settled by a contract in writing contract in writing was]* entered into between the said William W. Bierce Ltd. and the said Kona Sugar Co. Ltd., whereby the said William W. Bierce Ltd. offered in writing to permit the said Kona Sugar Co. Ltd., to take possession of the said rails, engines, cars and other goods and merchandise mentioned and to use the same upon the payment of $10,000.00 Gold Coin to the said William W. Bierce Ltd. and the execution of a promissory note by the said Kona Sugar Co. Ltd. to the said William W. Bierce Ltd. for $37,044.53, payable six months from date, upon the express condition, understanding and agreement that the said goods and merchandise should not become the property of the said Kona Sugar Co. Ltd., until the payment of the said note; which said offer and each and all of the terms and conditions thereof were accepted in writing by the said Kona Sugar Co. Ltd. upon the 13th day of March A. D. 1901 and a promissory note for $37,044.53 payable six months after date to the order of William W. Bierce Ltd. was duly executed and delivered by the said Kona Sugar Co. Ltd., to the said William W. Bierce Ltd. Copies of said contract and note, marked respectively Exhibit "A" and Exhibit "B" are hereto attached referred to and made a part hereof.

Amendment allowed by the Court this 7th day of March, 1904. P. D. Kellett, Jr., Clerk.

53 That thereafter, in accordance with the terms of said of March 13th 1901, [supplementary]* contract A but not otherwise, the said William W. Bierce Ltd. permitted the said Kona Sugar Co. Ltd. to take possession of and the said Kona Sugar Co. Ltd. did in fact take possession of the following goods and merchandise, to-wit:

[* Words enclosed in brackets erased in copy.]

362 tons of steel T. Rails weighing 35 lbs. to the yard.
Joints for laying 550 tons of Steel T rails.
Railroad track spikes to lay 550 tons of said rails.
10 sets of 35 lb. split switch material, complete.
16 cars, 25 feet long, 7 feet wide for 3 ft. gauge track.
One 9 x 14 Class "A" saddle tank locomotive.
One 10 x 16 back saddle tank locomotive.
One Howe Narrow gauge track scale, capacity 25 tons.
One set re-railers.
Four track gaugers, 3 feet.
One rail bender.
One track drill.
One section car with seats.
Two jacks.

Which said rails, cars, engines and other goods and merchandise as above enumerated were then and continued to be the property of the said William W. Bierce Ltd.; that the said Kona Sugar Co. Ltd., failed upon September 13th 1901, said date being six months from the date of the execution of the promissory note mentioned to pay the said note or the sum therein mentioned or any part thereof, nor has it the said Kona Sugar Co. Ltd. at any time since said date nor at any time, though thereto often requested by plaintiff, paid the said note or the sum thereon mentioned or any part thereof
54 nor has any third person for or on behalf of the said Kona Sugar Co. Ltd. or otherwise paid the said note or the sum therein mentioned or any part thereof.

7.

That from the date of said [supplemental] of March 13th 1901,

Amendment allowed by the Court this 7th day of March, 1904. P. D. Kellett, Jr., Clerk.

mentary]* contract A and up to the 1st. day of June A. D. 1903, the aforesaid property was at all times in the possession and control of the Kona Sugar Co. Ltd. or the Receivers of the said Kona Sugar Co. Ltd. duly appointed.

8.

That on or about the 1st day of April A. D. 1903, the Honorable W. S. Edings, Judge of the Circuit Court of the Third Circuit, sitting at Chambers in Equity, in that certain case of R. W. McChesney *et al. vs.* the Kona Sugar Co. Ltd. *et al.* ordered by F. L. Dortch, then Receiver of the Kona Sugar Co. Ltd. to sell all the property, both real and personal of the said Kona Sugar Co. Ltd.; that in pursuance of the said order the said F. L. Dortch proceeded to offer for sale and on the 9th day of May A. D. 1903, did sell the property of the Kona Sugar Co. Ltd., aforesaid, but that the said F. L. Dortch did not and could not sell the rails, cars, engines and goods and merchandise hereinabove more particularly described for the reason that the same were then and now are the property of William W. Bierce Ltd., plaintiff herein.

[* Word enclosed in brackets erased in copy.]

9.

That at the said sale of the property of the Kona Sugar Co. Ltd. the defendant C. J. Hutchins Trustee became the purchaser of the said property of the Kona Sugar Company Ltd.; that on June
55 1st A. D. 1903 the Honorable W. S. Edings, Judge of the Circuit Court of the Third Circuit sitting at Cha-bers in Equity made an order confirming the said sale; and that thereupon the defendant proceeded to and did take possession of all the property, real and personal, belonging to the Kona Sugar Co. Ltd.

10.

That the said defendant in addition to taking possession of the property of the Kona Sugar Co. Ltd. also took possession and control of the rails, engines, cars and other goods and merchandise hereinbefore more particularly described, belonging to plaintiff, and still retains possession and control of the same which said taking and retaining of the possession of the said rails, engines, cars and the other goods and merchandise hereinbefore more particularly described were unlawful and in contravention of the rights of plaintiff under the law.

11.

That the said rails, cars, engines and goods and merchandise hereinbefore more particularly described have been at all times mentioned in this complaint and now are the property of plaintiff and it has been and still is the true and lawful owner thereof and is entitled to the exclusive and immediate possession thereof.

12.

That the said William W. Bierce Ltd. has demanded of said defendant the return of all and singular the property aforesaid; but that said defendant has failed, neglected and refused and still fails, neglects and refuses to return the said property or any portion
56 thereof; that the said property was wrongfully taken and now is wrongfully detained by said defendant contrary to the rights of plaintiff therein; that the said property was taken by defendant and is now detained by defendant in the District of Kona, Island and Territory of Hawaii, and within the *the* jurisdiction of this Honorable Court.

13.

That the said property has not been taken for a tax assessment or pursuant to a statute or seized under an execution or an attachment against the property of the plaintiff.

14.

That the actual value of the said property is [Fifteen Thousand Dollars ($15,000.00).]* Twenty-two Thousand Dollars

Amendment allowed by the Court this 7th day of March, 1904. P. D. Kellett, Jr., Clerk.

Amendment allowed by the Court by substituting $22,000 for $20,000, this 19th day of M'ch, 1904. P. D. Kellett, Jr., Clerk.

[* Words and figures enclosed in brackets erased in copy.]

Wherefore the plaintiff prays:

1. That the process of this court may issue summoning the said defendant to appear and answer this complaint before a jury of the country at the December 1903 term of this Honorable Court, unless sooner disposed of by judicial authority.

2. That plaintiff may have judgment for the return of all and singular the said property together with damages for its taking and detention and the costs of this action.

WILLIAM W. BIERCE, LIMITED,
By KINNEY & McCLANAHAN,
E. B. M.,
Its Attorneys.

Dated Honolulu, July 20th, 1903.

HONOLULU, OAHU, *Territory of Hawaii ss:*

E. B. McCLANAHAN being first duly sworn on oath deposes
57 and says:

That he is a member of the firm of Kinney & McClanahan, attorneys for William W. Bierce Ltd., above-named plaintiff: That William W. Bierce Ltd. is a foreign corporation doing business without the Territory of Hawaii, that Kinney & McClanahan are the representatives of William W. Bierce Ltd. in this jurisdiction, that he has read the foregoing complaint and knows the contents thereof and that the matters and things set forth therein are true to the best of his knowledge, information and belief.

E. B. McCLANAHAN.

Subscribed and sworn to before me this 20th day of July A. D. 1903.

[SEAL.] GUSSIE H. CLARK,
Notary Public First Judicial Circuit.

58 EXHIBIT "A."

HONOLULU, H. T., *Mar.* 13, 1901.

Kona Sugar Company, Limited, Honolulu, H. I.

GENTLEMEN: In pursuance of the verbal agreement made between your President and William W. Bierce, Limited, we hereby offer the following terms in settlement of the contract between the Kona Sugar Company Limited and William W. Bierce Limited as evidenced by letter dated Feb. 21, 1900, and accepted by the Kona Sugar Company Limited, Feb. 22, 1900:

We will take in settlement of this contract the sum of $10,000, U. S. gold coin, and the promissory note of the Kona Sugar Company Limited for the sum of $37,044.53, in favor of William W. Bierce, Ltd.; payable six months after date at the Whitney National Bank in New Orleans, bearing interest at the rate of seven and one-half per cent. (7½%) per annum and secured by First Mortgage Bonds of

the Kona Sugar Company Limited of par value equal to the no
said bonds being portion of a duly authorized issue not exceedi
$200,000. This offer is conditioned upon its acceptance by yo
payment of the money and the delivery of the note, with collater
before 4 P. M. on Thursday, March 14th, A. D. 1901.

Upon such payment being made to us, before the hour named,
will deliver to you the bills of sale authorizing you to take charge
the rails, locomotives, cars, scales and other materials now awaiti
delivery, upon the express condition and understanding th
59 said rails, locomotives, cars, scales and other materials are a
shall remain the property of William W. Bierce, Limite
until the full payment of the note above described, according to
terms.

Very truly yours,

W. W. BIERCE, LTD.,
By H. T. GILBERT.

The above terms are accepted this March 13, 1901.

THE KONA SUGAR CO., LTD.
J. M.
By its President, [F. W.]* McCHESNEY.

[SEAL.] By its Treasurer, F. W. McCHESNEY.

Amendment allowed by the
Court this 8th day of March
1904. P. D. Kellett., Jr., Clerk.

Received on account of above agreement exchange on New Yo
for Ten Thousand Dollars and Seventy-six (76) $500. Bonds of t
Kona Sugar Co. Numbered from 1 to 76 both inclusive.

W. W. BIERCE, LTD.,
By H. T. GILBERT.

60 EXHIBIT "B."

$37044.53.

HONOLULU, H. I., *March* 13, 1901.

Six months after date we promise to pay to the order of Wm. W
Bierce, Limited, at the Whitney National Bank of New Orleans, L
U. S. A., the sum of Thirty Seven Thousand and Forty-four Dolla
and 53/100 ($37044.53) with interest at the rate of Seven and on
half per cent. per annum until paid both principal and interest pa
able in gold coin of the United States.

Secured by Bonds of the Kona Sugar Co. of the nominal value
Thirty Eight Thousand Dollars $38000—(Seventy Six Bonds of t
value of $500.00 each—numbered from 1 to 76 both numbers
clusive).

THE KONA SUGAR CO., LTD.,
By its President, J. M. McCHESNEY,
By its Treasurer, F. W. McCHESNEY.

[* Letters enclosed in brackets erased in copy.]

(Indorsed)

Pay to the order of Harry T. Gilbert

WM. W. BIERCE, LIMITED,
By WM. W. BIERCE, *Pre'd't.*

W. W. BONDEN,
Sec't'y & Treas.

HARRY T. GILBERT.

WM. W. BIERCE, LTD.,
By C. BIERCE, *V.-Pres't.*

WM. W. BIERCE, LTD.
W. W. BONDEN,
Sec'ty & Treas.

(Stamps)

61 Endorsed: Law No. —. Circuit Court 3rd Circuit, Territory of Hawaii. Wm. W. Bierce, Ltd., Plaintiff, *vs.* Clinton J. Hutchins, Trustee, Defendant. Replevin. —— ——, Judge. Kinney & McClanahan, Honolulu, Attorneys for Plaintiff. Office No. —. Rec'd $33. J. P. Curts, Clerk.

62 In the Circuit Court of the Third Circuit, Territory of Hawaii.

WILLIAM W. BIERCE, LTD., a Corporation,
v.
CLINTON J. HUTCHINS, Trustee.

$2.00 Stamps.

Term Summons.

The Territory of Hawaii to the High Sheriff of the Territory of Hawaii, or his Deputy; the Sheriff of the Island of Hawaii, or his Deputy:

You are commanded to summon Clinton J. Hutchins Trustee Defendant in case he shall file written answer within twenty days after service hereof, to be and appear before the said Circuit Court at the December Term thereof to be holden at Kailua Island of Hawaii on Wednesday the 23rd day of December next, at 10 o'clock A. M., to show cause why the claim of William W. Bierce, Ltd. a corporation Plaintiff should not be awarded to it pursuant to the tenor of its annexed Petition.

And you are commanded to And have you then there this Writ with full return of your proceedings thereon.

Witness Hon. W. S. Edings Judge of the Circuit Court of the Third Circuit, at Kailua, Hawaii this 20th day of July 1903.

[SEAL.] (Sig.) HENRY SMITH, *Clerk.*

Judiciary Department.

Written an the back of said Term Summons are the following endorsements:

Term Summons issued at three o'clock P. M., July 20th 1903. Henry Smith, Clerk Jud. Dept.

63 Returned at seven o'clock A. M., August 1, 1903. J. P. Curts, Clerk.

Served the within summons as follows: On Clinton J. Hutchins, trustee at his office in the City of Honolulu, Oahu, Territory of Hawaii, on the 20th day of July, A. D. 1903, by delivering to him a certified copy hereof and of the complaint hereto annexed, and at the same time showing to him the original summons and complaint.

Dated, July 20, 1903.

CHAS. F. CHILLINGWORTH,
Deputy Sheriff.

64 In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, December, 1903, Term.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee, Defendant.

(Stamp $1.00)

Replevin.

Bond.

Know all men by these presents:

That we, William W. Bierce, Limited, a Louisiana corporation having its principal place of business in Chicago, State of Illinois, acting herein by its duly authorized and appointed attorney-in-fact, H. A. Bigelow as Principal and John A. Candless and William R. Castle as Sureties, both of Honolulu, Territory of Hawaii, and residing in said Honolulu, are held and firmly bound unto Clinton J. Hutchins, Trustee, his successor or successors in trust, heirs and assigns by these presents in the sum of Thirty Thousand (30,000) Dollars, for the payment of which well and truly to be made, we hereby bind ourselves, our successors, executors and administrators, jointly and severally, firmly by these presents.

The condition of the foregoing obligation is as follows:

That whereas the said William W. Bierce Ltd. has begun in the Circuit Court of the Third Circuit of the Territory of Hawaii, a Replevin suit against the above-mentioned defendant to recover from him certain property more specifically set forth in the Bill of Complaint filed in said suit, which is hereby referred to, and has in writing requested the High Sheriff of the Territory of Hawaii,

65 or his Deputy, or the Sheriff of the Territory of Hawaii, or his Deputy to take the aforementioned property from the said defendant,

Now therefore if the said plaintiff shall well and truly prosecute the said action of Replevin to a successful and final termination, or in case the return of said personal property to the defendant be adjudged and said plaintiff, Principal herein, shall return the same to the said defendant and shall pay to him the said defendant such sum as may from any cause be recovered against the said plaintiff, then this obligation is to be null and void, otherwise to remain in full force and effect.

In Witness whereof we have hereunto set our hands and seals this 20th day of July, A. D. 1903.

WILLIAM W. BIERCE, LIMITED,
By H. A. BIGELOW,
Its Attorney in Fact.
J. A. McCANDLESS.
WILLIAM R. CASTLE.

The foregoing bond is hereby approved as to its sufficiency of sureties.

A. M. BROWN,
High Sheriff.

Honolulu July 20th, 1903.

Endorsed: 1370 Law No. 5782. Circuit Court First Circuit. Territory of Hawaii. William W. Bierce Limited, a corporation, Plaintiff, *vs* Clinton J. Hutchins, Trustee, Defendant. Bond. De Bolt, Judge. Kinney & McClanahan Honolulu Attorneys for W. W. Bierce, Ltd. Office No. —. Filed Aug. 1st. 1903, 7 o'clock A. M. J. P. Curts, Clerk. Law No. 6023 Plaintiff's Exhibit "B," Filed May 7th, 1908, Job Batchelor, Clerk.

66 In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, December, 1903, Term.

WILLIAM W. BIERCE, LTD., a Corporation, Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Affidavit.

HONOLULU, OAHU, *Territory of Hawaii, ss:*

E. B. McClanahan, being duly sworn, on oath deposes and says: that he is a member of the firm of Kinney & McClanahan the attorneys of William W. Bierce Ltd., a Louisiana corporation plaintiff in the above entitled action: that he is familiar with the facts alleged herein and that he makes this affidavit on behalf of said corporation.

First. That the said William W. Bierce Ltd., is the owner of the following property, to-wit:

362 tons of steel T rails, weighing 35 lbs. to yd.
Joints for laying 550 tons of steel T rails.
67 Railroad track spikes to lay 550 tons of said rails.
Ten sets of 35 pound split switch material, complete.
16 cars 28 feet long 7 feet wide for 3 ft. gauge track.
One 9 x 14 Class "A" saddle tank locomotive.
One 10 x 16 Class "N" back saddle tank locomotive.
One Howe narrow gauge track scale, capacity 25 tons.
One set re-railers.
Four track gaugers, 3 ft.
One rail bender.
One track drill.
One section car with seats.
Two Jacks.

Second. That the said property is now unlawfully detained by the above-mentioned defendant.

Third. That the said property has not been taken for a tax, assessment or fine pursuant to a statute or seized under an execution or an attachment against the property of the plaintiff.

Fourth. That the actual value of the said property is Fifteen Thousand (15,000) Dollars.

E. B. McCLANAHAN.

Subscribed and sworn to before me this 20th day of July A. D. 1903.

[SEAL.] GUSSIE H. CLARK,
Notary Public, First Judicial Circuit.

68 HONOLULU, H. T., *July* 20, 1903.

To the High Sheriff of the Territory of Hawaii or the Sheriff of the Island of Hawaii or his Deputy:

You are hereby required to take the property from the defendant in the action entitled herein or from his agent or agents. Said property being that fully described herein.

KINNEY & McCLANAHAN,
Attorneys for William W. Bierce, Ltd., the Plaintiff Herein.

Served the within Affidavit, Notice and Bond on the within named Clinton J. Hutchins, Trustee, defendant, at Honolulu, Oahu, this 21st day of July, A. D. 1903, By delivering to him, Copies hereof and at the same time showing him the original Affidavit, Notice and Bond.

Dated July 21st, 1903.

ALBERT McGURN,
Deputy Sheriff.

69 In pursuance of the within affidavit and order, I did on the 22nd day of July A. D. 1903, attach and take into my custody all the following described property:

362 tons of steel rails, weighing 35 pounds to the yd.
Joints for laying 550 tons of steel rails.
Railroad track spikes to lay 550 tons of steel rails.
Ten sets of 35 pound split switch material, complete.
16 cars 28 feet long 7 feet wide for 3 ft. gauge track.
One 9 x 14 Class "A" saddle tank locomotive.
One 10 x 16 Class "A" back saddle tank locomotive.
One Howe narrow gauge track scale, capacity 25 tons.
One set rerailers.
Four track gaugers 3 ft.
One rail bender.
One track drill.
One section car with seats.
Two Jacks.

The same being the property in said affidavit enumerated.

And did on the 22nd day of July A. D. 1903 release said property from such attachment upon the filing by Defendant of a written undertaking for double the value of the property attached.

(Signed) J. K. NAHALE,
Deputy Sheriff of North Kona, Hawaii.

(Endorsed:) Filed Aug. 1, 1903, 7 o'clock A. M. J. P. Curts, Clerk.

70 Circuit Court, Third Circuit, Territory of Hawaii.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
v.
CLINTON J. HUTCHINS, Trustee.

Stamped $1.00.

Replevin.

Return Bond.

Know all men by these presents:

That we Clinton J. Hutchins, Trustee, as principal and Henry Waterhouse and Arthur B. Wood as sureties are held and firmly bound unto William Bierce Company, Limited, its successor or successors and assigns in the sum of thirty thousand (30,000) Dollars, for the payment of which well and truly to be made, we bind outselves, our successors, herein and administrators jointly and severally firmly by these presents.

The condition of the foregoing obligation is as follows:

That whereas the said William W. Bierce, Limited, has begun in the Circuit Court of the Third Circuit of the Territory of Hawaii, a replevin suit against Clinton J. Hutchins, Trustee, to recover from him certain property specifically set forth in the Bill of Complaint filed in said suit, and of the value of $15,000 as stated in the affidavit filed therein, and has requested that the said property be taken possession of by the High Sheriff of the Territory of Hawaii, or his dep-

uties and turned over to said plaintiff; and whereas said defendant is desirous of having said property returned and has required the return thereof from said High Sheriff and his deputies;

Now therefore if the said property and all thereof shall be
71 well and truly delivered to said plaintiff, if such delivery be adjudged, and payment to said plaintiff be well and truly made of such sum as may, for any cause be recovered against the defendant, then this obligation to be null and void, otherwise to be and remain in full force and effect.

In witness whereof we have hereunto set our hands and seals this 21st day of July, A. D. 1903.

(Signed) CLINTON J. HUTCHINS, *Trustee.*
(Signed) HENRY WATERHOUSE, *Surety.*
(Signed) ARTHUR B. WOOD, *Surety.*

The foregoing Bond is approved as to its sufficiency of sureties.
(Signed) A. M. BROWN,
High Sheriff.

Dated July 21, 1903.

Endorsed: 1370 L. 5782. Circuit Court, Third Circuit, Territory of Hawaii. William W. Bierce, Limited, a Corporation, Plaintiff, *v.* Clinton J. Hutchins, Trustee. Return Bond. Filed Aug. 1st, 1903, 7 o'clock A. M. J. P. Curts, Clerk.

72 The Defendant's answer to the Plaintiff's complaint, which said answer was filed in the office of the Clerk of said Circuit Court of the Third Judicial Circuit, on the 20th day of August, A. D. 1903 and is in words and figures following, to wit:

In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Answer.

Now comes the defendant above named and for his answer to the complaint of the Plaintiff herein says:

I.

1. Defendant admits that he is a resident and citizen of the Territory of Hawaii, as in said complaint alleged.

2. Defendant admits that under and by virtue of an order of the Honorable W. S. Edings, Judge of the Circuit Court, Third Circuit, Territory of Hawaii, sitting at Chambers in Equity, duly made and entered in that certain action before him pending entitled R. W. McChesney, *et al. vs.* Kona Sugar Company, Limited, *et al.*, all of

the property, real personal and mixed, of the Kona Sugar Company, Limited, was on or about the 9th day of May, 1903, sold to this Defendant free and clear of all incumbrances.

3. Defendant alleges that the personal property set forth and described in the said complaint was on the 9th day of May 1903, and long prior thereto, the property of said Kona Sugar Company,
73 Limited, and was part of the assets and property so as aforesaid then and there sold to this defendant upon the confirmation of said sale on the first day of June, 1903, became, ever since has been and now is the owner in lawful possession thereof [and defendant then became, ever since has been and now is the owner in lawful possession thereof.]*

Amendment allowed by the Court this 10th day of M'ch, 1904. P. D. Keilett, Jr., Clerk. P. D. K., Jr., 3/10/04.

II.

And, except as hereinbefore admitted, qualified or alleged, defendant denies the truth of the facts stated in said complaint, and in each and every allegation thereof; and denies the truth of each and every fact therein stated.

Wherefore defendant asks to be hence dismissed with costs of this action.

Dated August 20th, A. D. 1903.

CLINTON J. HUTCHINS,
Trustee, Defendant.

JNO. W. CATHCART,
Attorney for Defendant.

Endorsed: Circuit Court Third Judicial Circuit, Territory of Hawaii. William W. Biece, Limited, Plaintiff *vs.* Clinton J. Hutchins, Trustee, Defendant. Answer. Filed Aug. 20, 1903, in Third Circuit Court. Henry Smith, Clerk Jud. Dept. John W. Cathcart, Attorney for Defendant, Stangenwald Building, Honolulu, T. H.

74 The plaintiff's motion to amend complaint, which was filed in the office of the Clerk of said Circuit Court of the Third Judicial Circuit on the 4th day of March, A. D. 1904, and is in the words and figures following, to wit:

[* Words enclosed in brackets erased in copy.]

In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, December, 1903, Term.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.
CLINTON J. HUTCHINS, TRUSTEE, Defendant.

Replevin.

Motion to Amend.

Now comes the above named plaintiff, by its attorneys Kinney, McClanahan & Cooper, and moves to amend its complaint heretofore filed herein as follows:

In paragraph 5 on the third page of said complaint on the first and second line- of said paragraph, strike out the words "a supplementary contract in writing was", and insert in lieu thereof the words, "said agreement of February 21, 1900, was adjusted and settled by a contract in writing."

In paragraph 6 on the fourth page of said complaint, on the second line of said paragraph striking out the word "supplementary" and adding after the word "contract" on said line, the words "of March 13th, 1901."

In paragraph 7 on the fifth page of said complaint on the first line of said paragraph, strike out the word "supplementary" and add after the word "contract" on said line the words "of March
75 13th, 1901.

In paragraph 14 on the seventh page of said complaint, strike out the words "Fifteen Thousand Dollars" and repeated numerals in brackets, and add in lieu thereof the words "Twenty Thousand Dollars."

This motion is based on the records, and the affidavit of E. B. McClanahan attached to and made a part hereof.

Dated March 4 1904.

KINNEY, McCLANAHAN & COOPER,
Attorneys for W. W. Bierce, L't'd.

(Endorsed:) Filed Mch. 4, 1904. P. D. Kellett, Jr., Clerk.

76 The stipulation filed in the Clerk's office of said Circuit Court and the order entered thereon by said Court on the 14th day of December, A. D. 1903, transferring said cause to the Circuit Court of the First Judicial Circuit of the Territory of Hawaii and directing all papers filed in said cause to be forwarded thereto, which said stipulation and order are in words and figures following, to wit:

In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, December, 1903, Term.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Stipulation.

It is hereby stipulated and agreed by and between the parties to the above cause that the venue of the same be changed from the Third Circuit to the First Circuit, and that the trial take place before the Circuit Court of the First Circuit instead of before the Circuit Court of the Third Circuit, and the said parties further agree that the above cause shall not be brought up for trial until the last week of February 1904.

WILLIAM W. BIERCE, LIMITED,
By Its Attorneys, KINNEY, McCLANAHAN & COOPER.
CLINTON J. HUTCHINS, *Trustee*,
By Its Attorneys, JNO. W. CATHCART.

77 Dated Honolulu, December 14th, 1903.

I allow the foregoing and hereby transfer said cause to the Circuit Court of the First Circuit and direct the Clerk of this Court to forward all papers in said cause to the First Circuit as aforesaid.

(Signed) W. S. EDINGS,
Judge Circuit Ct. Third Circuit.

(Endorsed:) Filed December 16, 1903. J. P. Curts Clerk.

78 The findings of fact and conclusions of law and the orders of said Circuit Court of the First Judicial Circuit aforesaid allowing the same, in said cause, which were filed and entered of record in said Court on the 15th day of March, 1904, and are in the words and figures following, to wit:

In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, December, 1903, Term.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Plaintiff's Request for Findings of Fact and Conclusions of Law.

Findings of Fact.

1.

That William W. Bierce, Limited, plaintiff, and the Kona Sugar Company, Limited, on February 21st, 1900, entered into the contract of that date attached to the deposition of Columbus Bierce, read in evidence.

2.

That the personal property sued for in this action was duly shipped to Honolulu, bills of lading having been taken out in the
79 name of the plaintiff, but said property did not pass into the possession of the Kona Sugar Company, Limited, until after the contract of March 13th, 1901, was entered into.

3.

That on March 13th, 1901, plaintiff and the Kona Sugar Company, Limited, entered into the contract of that date attached to plaintiff's complaint as Exhibit "A."

4.

That the payment of $10,000 under the contract of March 13th, 1901, and the giving of the note for $37,044.53 secured by the bonds of the Kona Sugar Company, Limited, was intended to be and was in settlement of the contract of February 21st, 1900, and said cash and said note and bonds were not given nor were they intended as the consideration for the purchase price of the materials sued for.

5.

That the condition precedent, the performance of which was to divest the plaintiff of title to the property sued for, was intended by the parties to be the payment of the note of $37,044.53 given in settlement of the contract of February 21st, 1900.

6.

That the contract of March 13th, 1901, was an entire contract, and intended so to be, for a lump sum consideration which consideration was incapable of being apportioned so as to make possible the

ascertainment of the price of the lienable and non-lienable items thereof.

7.

That by entering into the contract of March 13th, 1901, the contract of February 21st, 1900, was intended to be settled and adjusted.

80 8.

That both the plaintiff and the Kona Sugar Company, Limited, intended said contract of March 13th, 1901, to operate as a conditional sale of the property sued for and not as a chattel mortgage, or an absolute sale with lien reserved in the vendor.

9.

That in view of all the circumstances of the case said contract of March 13th, 1901, was a conditional sale and not a chattel mortgage, or absolute sale with lien reserved in the vendor.

10.

That some of the property sued for in this action, including railroad rolling stock, was not in fact used in the construction of the railway of the Kona Sugar Company, Limited, and was not lienable.

11.

That plaintiff did not at any time intend to, nor did it in fact waive its title to the property sued for, nor did it intend to, or in fact make any election of remedies or rights so as to bar the bringing of this action.

12.

That plaintiff did not intend to nor did it in fact waive its title by bringing the action to enforce a materialman's lien against the Kona Sugar Company, Limited, and its Receiver.

13.

That the acts of the plaintiff prior to the bringing of this action did not amount to a rescission of the contract of March 13th, 1901, and said contract as a matter of fact has not been rescinded.

14.

That the defendant attempted to purchase and did in fact take possession of the articles sued for, with knowledge both record and actual, of the plaintiff's claim and title thereto.

81 15.

That the actual value of said articles sued for was, at the time of bringing this action and now is, the sum of $22,000.

16.

That plaintiff has suffered damages from defendant's detention of the property in the sum of $1,045.00 being interest at six per cent. on said sum of $22,000 from June 1st, 1903, to the date of Judgment herein.

17.

That each and every material allegation in plaintiff's complaint has been established by the evidence.

The foregoing Findings of Fact is hereby allowed this 19th day of March, 1904.

(Signed) J. T. DE BOLT,
First Judge.

(Endorsed:) Filed March 15th, 1904. P. D. Kellett, Jr.

82 420. In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, December, 1903, Term.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Plaintiff's Requested Conclusions of Law.

1.

That the defendant is not in a position to be able to deny or require proof of plaintiff's corporate existence.

2.

That the contract of February 21st, 1900, was adjusted and settled between the parties by the contract of March 13th 1901.

3.

That the contract of March 13th, 1901, between plaintiff and the Kona Sugar Company, Limited, was a conditional sale and not a chattel mortgage or absolute sale with lien reserved in the vendor, and under it plaintiff held title to the property sued for.

4.

That the payment of $10,000 under the contract of March 13th, 1901, and the giving of the note therein for $37,044.53 secured by the bonds of the Kona Sugar Company, Limited, was in settlement and adjustment of the contract of February 21st 1900, and neither said cash or said note and bonds were given as a consideration
83 for the purchase price of the materials sued for.

5.

That the condition precedent, the performance of which was to divest the plaintiff of title to the property sued for was the payment of the note of $37,044.53 which had been given as one of the considerations for the settlement of the contract of February 21st, 1900.

6.

That the contract of March 13th, 1901 was an entire contract for a lump sum consideration and contained lienable and non-lienable items.

7.

That the plaintiff has made no election of either remedies or rights so as to bar the bringing and maintaining of this action.

8.

That plaintiff is entitled to judgment against the defendant for the return of the property sued for and damages for its detention, and in the event of defendant's inability to return the said property, plaintiff is entitled to judgment for $22,000 its value, and also damages for its detention.

The foregoing Conclusions of Law is hereby allowed this 19th day of March, 1904.

(Signed) J. T. DE BOLT,
First Judge.

(Endorsed:) Filed Mch. 15, 1904. P. D. Kellett, Jr. Clerk.

84 The decision rendered by said Circuit Court of the First Circuit in said cause, which was filed and entered of record in said court on the 19th day of March, 1904, and is in the words and figures following, to wit:

In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, December, 1903, Term.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Decision.

The Court having heard the above entitled cause does hereby find for the plaintiff for the recovery of the following property:

362 tons of steel T rails weighing 35 pounds to the yard.
Joints for laying 550 tons of steel T rails.
Railroad track spikes to lay 550 tons of said rails
10 set- of 35 pound split switch material, complete.

16 railway cars 25 feet long, 7 feet wide for 3 ft. gauge track.
One 9x14 Class "A" saddle tank locomotive
One 10x16 back saddle tank locomotive
One Howe Narrow gauge track scale, capacity 25 tons
1 set rerailers
Four track gaugers, 3 feet
One rail bender
One track drill
One section car with seats
Two Jacks

85 Together with damages for its detention from the 1st day of June 1903 to the date hereof, and in the event of the inability and failure of the defendant to forthwith make return of said property to the plaintiff, that the plaintiff shall have judgment for the value of said property found to be the sum of $22,000 and damages for its detention from the 1st of June 1903, found to be the sum of $1,045 and the costs of this action.

Dated, Honolulu, March 19th, A. D. 1904.

(Signed) J. T. DE BOLT,
First Judge of the Circuit Court of the First Judicial District.

(Endorsed:) Filed March 19, 1904. P. D. Kellett, Jr. Clerk.

86 The judgment which was filed and entered of record in said cause by said Circuit Court of the First Judicial Circuit on the 19th day of March, 1904, and which is in the words and figures following, to wit:

In the Circuit Court of the Third Judicial Circuit, Territory of Hawaii, December, 1903, Term.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Judgment.

This cause by stipulation of parties and consent of the above entitled Court coming on regularly to be heard at the January 1904 Term of the Circuit Court of the First Judicial Circuit, before the Honorable John T. DeBolt, on the 7th day of March A. D. 1904, and by stipulation of parties and consent of Court a jury having been waived and the above named plaintiff being present represented by its attorneys Messrs. Kinney, McClanahan & Cooper, and the above named defendant being present represented by his attorneys John W. Cathcart Esq., and Messrs. Castle & Withington, and said cause proceeding to trial on said last named day and continuing until Saturday the 12th day of March 1904, and the Court having heard the evi-

dence adduced by the respective parties and being fully advised in that respect and argument having been made by the respective counsel, and the Court being advised in all ways in the premises and having at the close of said argument rendered a decision in favor of the plaintiff and against the defendant for the return of the property sued for in said action together with the damages for its detention from the 1st day of June 1903 to the date hereof, or in default to make return of said property that said plaintiff recover the
87 value thereof shown to be the sum of $22,000 together with damages as aforesaid for its detention;

Now, Therefore, it is ordered and adjudged that the above named defendant Clinton J. Hutchins, Trustee, forthwith return into the possession of William W. Bierce Limited or its authorized agent or attorneys the following described personal property now in the possession of said defendant:

362 tons of steel T rails weighing 35 pounds to the yard
Joints for laying 550 tons of steel T rails.
Railroad track spikes to lay 550 tons of said rails
10 set- of of 35 pound split switch material, complete
16 railway cars 25 feet long, 7 feet wide for 3 ft. gauge track
One 9 x 14 Class "A" saddle tank locomotive
One 10 x 16 back saddle tank locomotive
One Howe narrow gauge track scale, capacity 25 tons
One set re-railers
Four track gaugers, 3 feet
One rail bender
One track drill
One section car with seats
Two Jacks

and that said William W. Bierce Limited, do have and recover from said Clinton J. Hutchins Trustee, the sum of $1045.00 as damages for the detention of said property from the 1st day of June 1903, to the date hereof, together with the costs of this action taxed at the sum of $50.50.

And it is further ordered and adjudged that on failure of the said defendant Clinton J. Hutchins, Trustee, to forthwith make such return of said property to the possession of said plaintiff, that said plaintiff William W. Bierce Limited have and recover from the said defendant Clinton J. Hutchins, Trustee the value of said property found and adjudged herewith to be the sum of $22,000 together with damages for its detention from the 1st day of June 1903 to the date hereof found and adjudged to be the sum of $1,045.00 together with the costs of this action taxed at the sum of $50.50.

Witness the Honorable John T. DeBolt, First Judge of the Circuit Court of the First Judicial Circuit.

Dated March 19th 1904.

(Signed) J. T. De BOLT,
First Judge.

88 (Endorsed:) Filed March 19, 1904. P. D. Kellett, Jr. Clerk.

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89 The defendant's bond for costs to accrue in the Supreme Court of the Territory of Hawaii in said cause, which said bond was filed in the office of the Clerk of said Circuit Court of the First Judicial Circuit on the 21st day of March, A. D. 1904, and is in words and figures following, to wit:

In the Circuit Court of the Third Judicial Circuit, Transferred to First Judicial Circuit, Territory of Hawaii.

WILLIAM W. BIERCE, L'T'D, Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

($1.00 Stamp.)

Bond.

Know all men by these presents:

That Clinton J. Hutchins, Trustee, as principal, and M. F. Scott as surety are held and firmly bound unto Henry Smith, Esq., Clerk of the Judicial Department of the Territory of Hawaii, and his successors in office in the penal sum of One Thousand Dollars which sum, well and truly to be paid, the said principal and surety do hereby bind themselves, their respective successors, heirs, executors, administrators and assigns.

The conditions of the above obligation are as follows:

That whereas in an action in replevin brought in the Circuit Court of the Third Judicial Circuit of the Territory of Hawaii by William W. Bierce, Ltd., as plaintiff against Clinton J. Hutchins, Trustee, as defendant, on the 20th day of July A. D. 1903 (which action was subsequently by stipulation of said parties transferred to the Circuit Court of the First Judicial Circuit of the Territory
90 of Hawaii for trial before the Honorable J. T. DeBolt, Judge of said Court, jury waived,) a decision was on the 12th day of March A. D. 1904, rendered by the Judge of said Circuit Court of the First Judicial Circuit in favor of said plaintiff and against said defendant, and thereafter to wit on the 19th day of March A. D. 1904, Judgment was entered by the Clerk of said Court in accordance with said decision,

And whereas said decision having been duly excepted to by the said defendant at the time of its being rendered and a notice of motion for a new trial having thereupon been duly given and the costs of said action having been paid by said defendant to the Clerk of said Circuit Court of the First Judicial Circuit.

Now therefore, if said motion for new trial is perfected and all costs of motion in case said defendant fails to sustain the same are paid and if such defendant shall not to the detriment of the plaintiff in said action remove or otherwise dispose of any property he may have liable to execution on such judgment, and if all costs are paid by the said defendant on writ of error or exceptions to the

Supreme Court of the Territory of Hawaii, if any such writ of error or exceptions are taken, then this obligation shall be null and void, otherwise to remain in full force and effect.

This bond is given under Section 1458 of the Civil Laws of the Territory of Hawaii, and is intended to cover all costs until the final determination of said action.

(Signed) CLINTON J. HUTCHINS, *Trustee,*
By ——— ———, *Att'y in Fact.*
M. F. SCOTT, *Surety.*

Dated Honolulu, this 21st day of March A. D. 1904.

The foregoing bond is hereby approved.

(Signed) J. T. DE BOLT, *Judge.*

(Endorsed:) Filed March 21st, 1904. George Lucas, Clerk.

91 The Order filed and entered of record in said cause in the Circuit Court of the First Judicial Circuit on March 21st, 1904, and which is in words and figures as follows, to wit:

In the Circuit Court of the First Judicial Circuit (Transferred from Third Judicial Circuit), Territory of Hawaii.

WILLIAM W. BIERCE, LIMITED, Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Order.

It is hereby ordered that Clinton J. Hutchins, Trustee, Defendant above named, be and he is hereby allowed fifteen days from and after the completion of the transcript of evidence and proceedings in the above entitled cause by the official stenographer of said court, within which to prepare, present for allowance and file a bill of exceptions in said action.

Dated Honolulu March 21st, 1904.

(Signed) J. T. DE BOLT,
First Judge Circuit Court, First Judicial Circuit.

Endorsed: Filed March 21, 1904 (Sgd.) Henry Smith Clerk.

92 The motion and notice filed and entered of record in the Circuit Court of the First Judicial Circuit on March 21, 1904, which is in words and figures as follows, to wit:

In the Circuit Court of the Third Judicial Circuit (Transferred to First Judicial Circuit), Territory of Hawaii.

WILLIAM W. BIERCE, LIMITED, Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Motion for New Trial.

Comes now Clinton J. Hutchins, Trustee, the defendant above named, by his attorneys Cathart & Milverton, and moves this Honorable Court that the decision and judgment in the above entitled action rendered and entered on the 12th day of March, A. D. 1904, and the 19th day of March, 1904, respectively, in favor of the above entitled plaintiff and against said defendant, be set aside, and a new trial granted on the following grounds, to wit:

For that the said decision and judgment were and are contrary to the law and the evidence, and the weight of the evidence, and for errors of law occurring during the trial of said action, which errors were duly excepted to by said defendant and such exceptions allowed by the court.

This motion is based upon all the pleadings, papers, files and proceedings in said action, the decision of said court, the record and judgment appertaining to said action, the official stenographer's notes of the evidence and proceedings taken at the trial of
93 the same, and the minutes of the clerk of said court taken herein.

CLINTON J. HUTCHINS, *Trustee,*
(Sgd.) By CATHCART & MILVERTON,
His Attorneys.

Honolulu, T. H. March 19th 1904.

Notice.

To Messrs. Kinney, McClanahan & Cooper, Attorneys for William W. Bierce, Ltd., the above named plaintiff:

You and each of you will please take notice that on Wednesday the 23rd day of March A. D. 1904, at 9 o'clock A. M. of said day, or as soon thereafter as counsel may be heard, we shall present the foregoing motion before the Hon. J. T. De Bolt, First Judge of the Circuit Court, First Circuit.

(Sig.) CATHCART & MILVERTON,
Attorneys for Defendant.

Dated Honolulu, T. H. March 21st 1904.

Endorsed: Filed March 21, 1904. (Sgd.) George Lucas Clerk.

94 In the Supreme Court of the Territory of Hawaii, October Term, 1904.

W. W. BIERCE, LIMITED,
v.
C. J. HUTCHINS, Trustee.

Exceptions from Circuit Court, First Circuit.

Argued November 14, 1904; Decided January 28, 1905.

Frear, C. J., Hartwell and Hatch, JJ.

Election between inconsistent remedies—Materialman's lien and replevin, in case of conditional sale.—An election of a remedy based on one theory, as, for example, in the case of a conditional sale, the enforcement of a materialman's lien, which assumes that the property is in the defendant, estops the plaintiff from afterwards pursuing a different remedy based on an inconsistent theory, as for example, an action of replevin, which assumes that the property is still in the plaintiff. An election is of rights rather than of remedies, though usually referred to as the latter, and, once made, is final, even though the action which evidences it is not carried to final judgment.

Id.—Distinguished from mistake of remedies.—There is no election where the first remedy is adopted through ignorance of the facts or under some circumstances through ignorance of legal rights and would necessarily be ineffectual, but in this case the court cannot say that the first remedy was adopted through such ignorance or that it would have been ineffectual.

Materialman's lien—Lienable and nonlienable items under entire contract.—A materialman's lien cannot be enforced for lienable items under an entire contract which covers non-lienable items also, but in this case the court holds that the prices of at least some of the lienable items is severable.

Opinion of the Court by FREAR, *C. J.*:

This is an action for replevin of certain rails, cars, locomotives, equipments and materials of a railroad on the plantation of the Kona Sugar Co., Ltd., all of the property of which company had been purchased by the defendant at a receiver's sale. The plaintiff had delivered this railroad property to the company under an agreement claimed by the plaintiff to be a conditional sale and so held by the trial judge, who heard the case, jury waived, and rendered judgment for the return of the property and $1030 damages and an
95 alternate judgment for $22,000 in case the property should not be returned. The case is brought here by the defendant upon numerous exceptions. It has been argued and briefed at considerable length upon many points, but, in the view that we take, it would be sufficient to decide the single point as to whether the plain-

tiff is estopped from bringing this action of replevin, based on the theory that the title to the property is in itself, for the reason that it had previously elected to pursue an inconsistent remedy, namely, by bringing an action for the price of the property and to enforce a material man's lien for the same, on the theory that the title to the property had passed to the vendee, the Kona Sugar Company.

It is a well settled principle of law that when a person adopts one of two or more inconsistent positions, whether in litigation or *in pais*, he cannot afterwards repudiate that position and adopt another. Any decisive act with knowledge of his rights and the facts determine his election and work an estoppel. In order to work an estoppel upon the principle of election it is not necessary that the course first adopted should be pursued to completion or that it should result in success or satisfaction. When there are two or more consistent remedies they may be pursued successively at pleasure, and there will be no estoppel as to one until satisfaction has been obtained in another. But the rule is entirely different as respects inconsistent remedies or rather remedies based upon inconsistent theories. As soon as one is chosen the decision is final and no other inconsistent remedy can be pursued. The doctrine of election is not a mere matter of remedies, although it is often spoken of as if it were. It is really a matter of rights. The election is of rights rather than of remedies, the latter being the evidence of the former. These propositions do not seem to be questioned by the plaintiff and they are sustained by the cases cited *infra*.

Just how far a vendor may go in enforcing payment of the purchase price in the case of a conditional sale, which for present
96 purposes we will assume this sale to be, is a matter of some diversity of opinion. It may be that a mere action for the price, although carried to judgment, should not be held to amount to an election where by the very terms of the contract the title is to remain in the vendor until payment of the price, for in such case an action alone for the price would not necessarily assume that the title had passed to the vendee inconsistently with the terms of the contract, and it would seem to be immaterial on the question of the transfer of title whether the payment, upon which such transfer would take place under the terms of the contract, were voluntary or forced through legal proceedings. Such was the holding in *Thomason v. Lewis* 103 Ala. 426, 15 So. 830 (see also *Campbell Mfg. Co. v. Rockaway Pub. Co.*, 56 N. J. L. 676), although perhaps the weight of authority is the other way. See cases *infra*. Be that as it may, it seems to be pretty generally held that if the action is accompanied by an attachment upon the property in question, there will be an estoppel by election, on the theory that an attachment recognizes the title as being in the vendee, although the contrary seems to have been held in *Matthews v. Lucia*, 55 Vt. 308, and perhaps other cases. See *Crompton v. Beach*, 62 Conn. 25; *Smith v. Barber*, 153 Ind. 322; *Bailey v. Hervey*, 135 Mass. 172; *Fuller v. Eanes*, 108 Ala. 434, 19 So. 366; *Heller v. Elliott*, 45 N. J. L. 564; *Button v. Trader*, 75 Mich., 295; *Parke etc. Co. v. White River etc. Co.*, 101 Cal. 37; *Ormsby v. Dearborn*, 116 Mass. 386; *Allbright v. Mere-*

dith, 58 Ohio St. 194. In *Bank v. Thomas,* 69 Tex. 237, it was even held that an endorsement of notes given for the purchase price amounted to an election which would preclude the right to reclaim the property, because a transfer of the notes did not amount to an assignment of the contract which provided for the retention of the title, but was a separation of the right to the price from the right to the property, which put it out of the power of the vendor to restore the notes in case he should desire to enforce the claim to the property. It was further held that the right to reclaim the property could not be restored by taking back the notes. In the pres-
97 ent case the greater part of the purchase price was in the form of a note which was afterwards endorsed over by the Plaintiff and later endorsed back to it, but we need express no opinion as to the effect of this. Certainly, an attempt to enforce a mechanic's or material man's lien in addition to the allegations in assumpsit in that suit would indicate an election to treat the title to the property as having passed to the vendee as much as an action of assumpsit coupled with an attachment would; and it has been so held by the Supreme court of Alabama, which as shown above, had held that an action alone, thought carried to judgment, would not amount to an election. In *Hickman v. Richburg,* 122 Ala. 638; 26 So. 136, it was held that an attempt, though ineffectual, to establish a material man's lien on property sold was an abandonment of the title reserved on the sale. Among other things the Court said:

"It would seem from these authorities, that the question of election is not made dependent upon whether such election may be rendered effectual or not. Any unequivocal act on the part of the vendor, recognizing the title as being in the vendee, will preclude such vendor from afterwards setting up title in himself; and it is also well settled that, when an election between inconsistent rights is once made, it cannot be afterwards revoked. It is clear that the claimant in this case could not, under the statute, fix a material man's lien upon property the title to which was in himself; and, when he filed his claim and statement with the probate judge for the purpose of creating a lien upon the lumber in question, this was an unequivocal act on his part to treat the lumber as the property of the defendant in execution, and of course, a waiver and abandonment of the title reserved on the sale."

The same court had made a similar decision previously. *Lehman, Durr & Co. v. Van Winkle,* 92 Ala. 443, 8 So. 870.

Cases such as *Peninsula El. Co. v. Norris,* 100 Mich. 496, and Case Mfg. Co. *v.* Smith, 40 Fed. 339, which hold that a provision in a contract for a retention of the title does not prevent the
98 enforcement of a lien, are not inconsistent with these propositions. They, on the contrary, show that, so far as such a provision is concerned, the remedy by lien is effectual. They do not hold that, if such a remedy is pursued, the remedy by recovery of the property afterwards would not be precluded.

The Plaintiff, without disputing the soundness of these views, seeks to show that they are inapplicable to the present case, upon the principle, which also is general-y recognized, that the doctrine

of the election of remedies does not apply where the remedy first pursued would necessarily be ineffectual. There is a distinction between an election of remedies and a mistake of remedies. An election implies that there are two or more remedies as to which a choice may be made, but if there are not, although the party may suppose that there are, there can be no election. For instance, if one should attempt to enforce a mechanic's or material man's lien on the theory that he was a subcontractor and it should turn out that he was a principal contractor, he would not be estopped from subsequently enforcing a lien as principal contractor. *McLaughlin v. Austin* 104 Mich. 489. The institution of a suit mistakenly as subcontractor would not alter the relation between the parties. But the retention of title by a vendor is a privilege reserved for his benefit, which he may waive at pleasure, in which case the sale would become absolute, and if he does waive this right by taking steps inconsistent with it, he cannot afterwards retrace his steps and by his own act alone restore the title to himself. An attempt to enforce a lien would not, of course, preclude his resorting to other remedies to enforce the payment of the price, provided such remedies were consistent with the theory that the property was in the defendant. There is no election where a party attempts a remedy in ignorance of material facts or under certain circumstances even in ignorance of his legal rights, if the rights of the other party are not prejudiced thereby or the rights of third parties have intervened. It is contended by the Defendant that the Kona Sugar Company and its creditors were prejudiced by the conduct of the Plaintiff in pursuing its remedy under the material man's lien law for a long
99 period without asserting a claim to the property. As to that no opinion need be expressed. A remedy is not ineffectual, however, within the meaning of this doctrine merely because, although it may be carried to final judgment, little or nothing may be realized or satisfaction may not be obtained. In the present case the attorney who instituted the suit to enforce the material man's lien testified in substance that that suit rather than an action to recover the property was brought in the first instance because the latter would have meant the collapse of the plantation at once on account of the railroad being essential to the taking off of a portion of the crop, and that it was discontinued because it was found that the plantation was running behind and it would be impossible to save any of its assets to pay anybody and useless to do anything to rehabilitate the plantation, and it is contended that the suit to enforce the lien was brought without much thought as to its effectiveness or results. Similar contentions have been made in other cases without success. For instance, in *Lehman, Durr & Co. v. Van Winkle, supra,* as stated in *Hickman v. Richburg, supra,* "the vendor of the property had perfected a material man's lien under the statute, but subsequently, by novated contract, in which the title to the property was reserved to the vendor until the payment of the purchase money, some of the purchase-money notes being extended beyond the time within which the lien created under the statute could be enforced and which effectually destroyed the statutory lien, is was held

that a suit brought to enforce the lien subsequent to the novated contract, although afterwards dismissed on advice of counsel that there was no lien to enforce, such action was an unequivocal election to treat the property as that of the defendants, and wholly inconsistent with the retention of title in the vendors under the novated contract." It may be remarked in passing that the plaintiff in the present case relies upon the novated contract. In *Richards v. Schreiber*, 98 Ia. 422, it is claimed that an action for the price with
100 an attachment was hastily brought by attorneys not fully advised of the facts and that it should not be treated as an election of remedies, but the court said that there was nothing to show that the action was not brought with full knowledge of all the facts and that it should be given the effect of an election to treat the property as sold absolutely. This might equally well be said in the present case. In *Heller v. Elliot supra*, an action with attachment proceedings was held an election although it was discontinued. In that case the claim was made that the action was brought in ignorance of the facts and that therefore it should not be held to be evidence of an election, but it appeared by the evidence that the ignorance consisted merely in the supposition that the goods were out of reach and therefore could not be recovered specifically. In *Hickman v. Richburg, supra*, an election was held to have been made where the attempt to enforce the lien was ineffective because of the insufficiency of the preliminary statement that was filed for the purpose of securing a lien.

What the plaintiff relies upon principally, however, in order to show that there was no remedy under the material man's lien law is its contention that since some of the property that was sold, as for instance, the cars and locomotives, were nonlienable (because they were not and could not be attached to the realty), and since the contract was entire (because all of the goods were sold for a lump sum), the price of the lienable items could not be severed and therefore no lien could be enforced as to any of the items. It is no doubt true that a lien cannot be enforced for lienable items under an entire contract which covers nonlienable items also, but in our opinion the contract in the present case is not such as to prevent a severance of the price of the lienable items from the price of the nonlienable items. The original contract of February 21, 1900, specifies in detail the various items and the prices of each item as well as other terms relating to delivery, payment, etc. The property was shipped in accordance with the terms of that contract, but the bills of lading and the property were not delivered for the reason that the drafts,
which, with the bills of lading, were sent to a third party for
101 collection, were not paid. A supplementary contract was accordingly made March 13, 1901, purporting to be "in settlement of the contract" previously made. Under this latter arrangement it was agreed that the Kona Sugar Company should pay $10,000 in cash and give its note for the sum of $37,044.53 payable in six months with interest at 7½ per cent. and secured by the Kona Sugar Company's first mortgage bonds as collateral, whereupon the plaintiff was to deliver the property upon the condition that it

should remain the property of the plaintiff until the payment of the note. This arrangement was carried out. The total amount, including the cash and the note under this arrangement, was $47,044.53. The aggregate amounts under the first arrangement, it is said, would be about $45,000. Probably the difference between these two amounts covered expenses that had occurred meanwhile for storage or otherwise. The first of these contracts is made a portion of the second by express reference. They must be construed together. The first shows that the price for at least a portion of the lienable materials may be ascertained.

It may be added that it is at least doubtful whether, assuming that the contract was entire so far as now appears, the court should in the present case go into the question whether the attempt to enforce a lien might have terminated successfully in whole or in part, for it is impossible to say what evidence might have been introduced in that case. The plaintiff in instituting that proceeding was not ignorant of any of the facts. Its contention is that it did not know the law or rather it did not take sufficient pains to ascertain the law. The ground, apparently an after-thought, now relied on to show that that suit would have been ineffectual is not one of the jurisdiction of the court or any proposition of law that would clearly show that those proceedings would have been ineffectual. It depends in part at least upon the evidence, and there is no certainty as to what that might have been in that case. That case was not carried to final judgment. It is hardly proper to try it in full as a side issue in the present
102 case. Nor need we say whether, if a lien could not have been enforced because the contract was entire, there would be no estoppel by election.

It has been settled in this jurisdiction that the findings of fact of a trial court, jury waived, have the same force as the verdict of a jury, but upon the question of election in this case the material facts are undisputed and the construction of the contracts which are in writing, is a matter of law for the court. Under such circumstances this court may reverse the findings and judgment of the trial court, and it does so in this case.

The exceptions, so far as they raise the question of election are sustained, the judgment of the trial court is reversed and the case is remanded to that court for such further proceedings as may be proper.

Kinney, McClanahan & Cooper, S. H. Derby and C. A. Galbraith for plaintiff.

J. W. Cathcart, Castle & Withington and W. L. Whitney for defendant.

A. F. FREAR.
ALFRED S. HARTWELL.
F. M. HATCH.

Endorsed: Supreme Court Territory of Hawaii. W. W. Bierce & Co. *v.* C. J. Hutchins. Filed Jan. 28, 1905. George Lucas, Clerk.

103 In the Supreme Court of the Territory of Hawaii.

WILLIAM W. BIERCE, LTD.,
vs.
CLINTON J. HUTCHINS, Trustee.

Petition and Motion for Rehearing and Reargument.

Now comes the Plaintiff herein, by its attorneys Kinney, McClanahan & Cooper, and C. A. Galbraith, and petitions and moves this Honorable Court for a rehearing and reargument of the above cause upon the grounds that (1) the court failed to decide whether Plaintiff was entitled to have any of the issues in the above cause retried, although a ruling on this point was vital to the Plaintiff (2) questions decisive of the case and duly submitted by counsel were overlooked by the court (3) questions decisive of the case and duly submitted by counsel did not receive due consideration from the Court. (4) the decision herein contains manifest error and usurps the functions of a trial court in passing on questions of fact (5) said decision is in conflict with controlling decisions of this court that findings of fact in a jury waived case are conclusive if there is any evidence beyond a scintilla to support said findings, and also similar controlling decisions in regard to the law of estoppel. Said grounds are more particularly as follows:

A. The Court failed to decide, and it is submitted that it should decide, whether Plaintiff is entitled to a new trial as regards the recovery of the non lienable items at least in the contracts of February 21st, 1900 and March 13th, 1901, which point is left entirely indefinite and uncertain in the decision herein (see in this connection affidavit of S. W. Derby hereto attached.)

B. The Court failed to decide and it is submitted that it should decide, whether the Court should in the present case go into
104 the question whether Plaintiff's attempt to enforce a lien might have terminated successfully in whole or in part, and the Court committed manifest error in deciding that the ground relied on by Plaintiff to show that its lien suit would have been ineffectual was not one based on any proposition of law that would clearly show that said suit would have been ineffectual, as regards some of the items at least (such as the rolling stock) on which it was sought to enforce a lien and in deciding that the result of said suit, as to such items would depend in part at least upon the evidence.

C. That in deciding that the contract of March 13th 1901 was not an entire contract, the Court overlooked or failed to give due consideration to (1) the testimony of Harry T. Gilbert, who negotiated the contract in question, and especially his answer to interrogatory 14 explaining the circumstances under which said contract was made, and also the testimony of William W. Bierce to the effect that the contract was entire (Transcript 32) (2) all the circumstances surrounding said transaction and especially the payment of the $10,006 and the impossibility of apportioning it to the non-lienable

rather than the licnable items in the contracts of February 21st, 1900 and March 13th, 1901, as well as the difference in price in the said contracts (3) the very terms of the contract of March 13th, 1901 itself showing that it was *in settlement of* the prior contract and (4) to the fact that said testimony, circumstances and contract might conceivably lead a reasonable man to find that said contract was an entire contract; and hence said decision herein is in conflict with controlling decisions of this Court that findings of fact in a jury waived case are conclusive if there is any evidence beyond a scintilla to support said findings.

D. That the Court overlooked or failed to give due consideration to Plaintiff's contention that its lien suit was based on the contract of February 21st, 1900, which had been abrogated by the contract of March 13th 1901.

E. That the Court committed manifest error, failed to give due consideration to the argument of counsel and assumed the
105 functions of a trial Court in assuming that the difference in the aggregate amounts payable under the contracts of February 21st, 1900 and March 13th 1901 was probably due to expenses for storage and otherwise instead of considering said circumstances as supporting the conclusion that the second contract was an entire one for a lump sum consideration.

F. That the Court committed manifest error and overlooked or failed to give due consideration to the argument of counsel in applying the principles of estoppel in the above cause, in that it nowhere appears that anyone was misled to his injury by Plaintiff's action and in that the parties claiming the estoppel were fully cognizant of all the facts or were charged with knowledge thereof, and in that said decision in applying the priniciples of estoppel to this case was in conflict with controlling decisions of this court on the law of estoppel.

G. That the Court committed manifest error in deciding that the Plaintiff had made an election.

This petition is based on the records in the case and on the affidavit of S. H. Derby hereto attached and made a part hereof.

Dated February 25th 1905.

(Sig.) KINNEY, McCLANAHAN & COOPER,
(Sig.) C. A. GALBRAITH,
Attorneys for Plaintiff.

R'c'd Copy Feb'y 25th, 1905

(Signed) J. W. CATHCART,
W. L. WHITNEY,
CASTLE & WITHINGTON,
Attorneys for Defendant.

106 In the Supreme Court of the Territory of Hawaii.

WILLIAM W. BIERCE, LTD.,
vs.
CLINTON J. HUTCHINS, Trustee.

ISLAND OF OAHU, *Territory of Hawaii, ss:*

S. H. Derby being first duly sworn on oath deposes and says:

That he is a member of the firm of Kinney, McClanahan and Cooper, attorneys for the Plaintiff herein and has been familiar with the above cause in all its stages; that at the trial of the above cause before the Honorable J. T. Debolt, First Judge of the Circuit Court of the First Circuit, it was deemed absolutely necessary to have William W. Bierce, President of the Plaintiff corporation present as a witness at the trial, and that said William W. Bierce travelled from Oklahoma City, Oklanoma, to Honolulu to attend said trial, and gave material and valuable evidence in regard to the value of the property in controversy at the date the above suit was instituted; that if a new trial is had of said cause it will be necessary either to have said William W. Bierce present or at least to take his deposition; that said William W. Bierce is still a resident of Oklahoma City and could ill spare the time to attend a new trial of the above cause though affiant verily believes that he would attend such trial if the same was had; that in any event said new trial would involve considerable expense to the Plaintiff herein; that the affiant has carefully examined the decision of this Court and is unable to say from said decision whether Plaintiff has any such standing in Court as would make it worth while to retry the cause in that it is impossible to tell from said
107 decision whether or not Plaintiff still has a right to sue as regards the non-lienable items in the contract of March 13th, 1901; that the decision of said point will enable Plaintiff to decide whether to pursue its action or not, and that the said point is a point necessarily arising in the case and proper to be considered by this Court.

(Sig.) S. H. DERBY.

Subscribed and sworn before me this 24th day of February A. D 1905.

[SEAL.] (Sig.) GUSSIE H. CLARK,
Notary Public, First Judicial Circuit.

(Endorsed:) Filed February 25th, 1905 at 9.40 A. M. George Lucas Clerk.

108 In the Supreme Court of the Territory of Hawaii, Octobe Term, 1904.

W. W. BIERCE, LTD.,
v.
C. J. HUTCHINS, Trustee.

The court requests further argument by counsel upon the motio for a rehearing in the above entitled case on Tuesday, the 18th inst on the following questions:

If the contract was one of conditional sale or an executory contrac to sell upon condition precedent.

(1) Was it entire?

(2) Could the lien suit have been maintained?

(3) How far ought the court to go into the question whether th lien suit could have been maintained?

(4) If the lien suit could not have been maintained, did it sho an election of rights?

(5) Did the plaintiff have a right to elect between an absolut sale and a conditional sale or executory contract to sell?

(6) If the defendant had pleaded the lien suit, would the ple have been had on demurrer?

GEORGE LUCAS, *Clerk.*

Honolulu, April 13, 1905.

Endorsed: Supreme Court Territory of Hawaii. W. W. Biere Ltd. *vs.* C. J. Hutchins, Trustee. Request for further Argument Filed April 13, 1905. George Lucas, Clerk.

109 Thereupon, to wit, on the 13th day of March, 1905 in the October Term of said Supreme Court of the year 1904, in the record of the proceedings thereof in said cause, appears the following entry, to wit:

Supreme Court of the Territory of Hawaii, October Term, 1904.

Vol. 1, p. 141.

W. W. BIERCE, LTD.,
v.
C. J. HUTCHINS, Trustee.

HONOLULU, MONDAY, *March 13th,* 1905.

Clerk's Minutes.

Motion for Rehearing

Before Frear C. J., Hartwell and Wilder, JJ.

Kinney, McClanahan and Cooper: S. H. Derby and C. A. Galbraith for the Plaintiff and J. W. Cathcart and Castle & Withington for Defendant.

Mr. Derby reads motion for rehearing also affidavit of S. H. Derby.

Mr. Calbraith argues.
Mr. Derby argues.
Mr. Cathcart argues.
The Court takes the matter under consideration.

110 Afterwards, to wit: on the 29th day of April, A. D. 1905, in the October Term of said Supreme Court of the year 1904, there was filed in the Clerk's office of said Supreme Court in said entitled cause, the opinion of said Supreme Court by Mr. Chief Justice Frear and the concurring opinion of Mr. Justice Hartwell, which said opinion and concurring opinion are in the words and figures following, to wit:

In the Supreme Court of the Territory of Hawaii, October Term, 1904.

W. W. BIERCE, LTD.,
v.
C. J. HUTCHINS, Trustee.

Petition for Rehearing.

Argued March 13 and April 18, 1905. Decided April 29, 1905.

Frear, C. J., Hartwell and Wilder, JJ.

Election—its nature and effect.—Election is a choice between inconsistent remedial rights. It may be manifested by the institution of an action to enforce one of the rights, whether the action is carried to completion or not and whether, if it should be carried to completion, it would be successful or not. It is of rights rather than of remedies, the attempt to enforce a particular remedy being the manifestation of the choice of one of the rights. But there cannot be an election unless there are two or more rights to elect between, and so the bringing of an action to enforce a supposed but nonexisting right does not preclude the bringing of an action to enforce an inconsistent existing right. Likewise, even if there are two or more inconsistent rights and an action is brought to enforce one, there is no election, if such action is brought in ignorance of the facts; but if the action is brought with knowledge of the facts, there is an election, even though there
111 is no action intent to abandon the other inconsistent right or rights. Other actions may be brought to enforce the same or other consistent rights but not to enforce other inconsistent rights. And, of course, there is no election when inconsistent rights are proceeded on at the same time. An election once made is irrevocable. It differs from the various classes of estoppel proper and rests on the principle that one cannot occupy inconsistent positions.

Id.—Of right to proceed on theory of absolute sale by bringing lien suit, precludes proceeding on theory of conditional sale by replevin.—In the case of a conditional sale, the vendor may waive the condition and treat the sale as absolute, as by instituting a material-man's lien suit based on the theory that the title has passed to the vendee, but if he so elects with knowledge of the facts he cannot afterwards treat the sale as conditional, as, by bringing replevin based on the theory that the property is still in him. Such is the result, even though the lien suit could not have been carried to judgment with success, for in such case the election is between the existing inconsistent rights to proceed on the theory that the title has passed and to proceed on the theory that it has not passed; it is not merely between a supposed but non-existing remedy by lien suit and an existing remedy by replevin.

Id.—Cannot be made to treat sale conditional in part and absolute in part.—The bringing of the lien suit bars the action of replevin even though only a portion of the items covered by the contract and for which the lien suit was brought are lienable.

Opinion of the Court by FREAR, *C. J.*:

This is a petition for a rehearing of the case decided ante page 418. The action is for replevin for rails, cars, etc. claimed to have been sold by the Plaintiff on the condition that title should remain in it until payment. The court held that even if title were to remain in the plaintiff until payment still the plaintiff could not main-
112 tain replevin, which is based on the theory that the title was in it, for the reason that it had previously elected an inconsistent right by bringing an action for the price and to enforce a materialman's lien which was based on the theory that the title had passed to the vendee.

For the purposes of the original decision it was assumed that the contract was one of conditional sale or, prehaps more accurately speaking, that it was an executory contract to sell upon condition precedent. We will proceed upon that assumption for the purposes of the present decision also, although it may not be out of place to state that in the opinion of a majority of the court the sale was absolute and therefore replevin could not be maintained in any event.

The petition sets forth seven grounds, all of which were either considered by the court or not raised by counsel at the original hearing. They may be summmed up as follows: (1) That the court should have decided, but did not so so, whether the plaintiff is entitled to a new trial as regards the items which, by reason of not having become attached to the realty, were not subject to a materialman's lien, and (2) that the court overlooked or did not give due consideration to certain points bearing upon the question whether the institution of the materialman's lien suit amounted to an election.

As to the first of these grounds, the court merely reversed the judgment of the trial court and remanded the case for such further proceedings as might be proper, not knowing whether the plaintiff

would be able to introduce further evidence bearing on the question of election which would make it worth while to have a new trial. Apparently the plaintiff knows of no other evidence that it can introduce upon that question but now asks the court to decide whether the election manifested by the institution of the lien suit extended to all the items covered by the contract or only to the lienable items. It was unnecessary to pass upon this as a primary question in the original opinion but it was passed upon incidentally by inference from the reasoning in that opinion. It goes without saying that the Plaintiff could not elect to treat the sale as absolute as to part of the property covered and conditional as to the remainder. The lien suit was in fact instituted as to all the items.

113 As to the second ground, it will be unnecessary to discuss in detail all the points raised by counsel, for to do that would mean largely a repetition of what was said with more or less ful-ness in the former opinion upon the doctrine of election and its application to the facts of this case. It will be sufficient to refer to a single point in regard to which counsel for the plaintiff seems not fully to understand the former opinion. As shown in that opinion the election is not so much between remedies as between rights. The election in this case was between the right of the plaintiff to proceed upon the theory that the sale was conditional and that the title remained in it until payment, and the right to proceed upon the theory that the sale was absolute and that the title had passed to the vendee, the plaintiff having a choice between such rights if the contract was one of conditional sale. The election was between the right to the property on the theory of conditional sale and the right to the purchase price on the theory of absolute sale. It was not, as contended by the Plaintiff, between a remedy by lien suit and a remedy by replevin. An election is an unequivocally manifested choice between two or more inconsistent rights. The pursuit of a particular remedy is the manifestation of the choice between the rights. If two rights exist the choice may be manifested by the institution of an action, whether the action is or could be carried to completion with success or not. If the action is discontinued or fails of success the plaintiff may pursue other consistent remedies, that is, other remedies based on the same or a consistent right, but not other inconsistent remedies, that is, remedies based on an inconsistent right. If there is in fact only one right the institution of any number of actions on supposed but nonexisting other inconsistent rights will not amount to an election or prevent the institution afterwards of an action upon the only right that does exist. Likewise, if there are in fact two inconsistent rights and an action is brought on one under a mistake of fact and discontinued upon obtaining knowledge of the facts, there will be no election and the other inconsistent right may afterwards be proceeded upon, provided there are no elements of an estoppel *in pais*, as, for instance, prejudice to the other side. In the present case the

114 plaintiff might have elected to rely on the right of property in itself under a conditional sale by bringing any one of several actions, as, for instance, replevin, trespass, detinue, etc., or it might have manifested its election to proceed on the theory of an

absolute sale and property in the vendee by bringing a lien suit or an action of assumpsit accompanied by attachment, etc., or it might have brought an action which would be consistent with either right and not amount to an election, as, for instance, a simple action of assumpsit for the purchase price. Under some circumstances a mere action of assumpsit would show an election, but not in this case because of the special provisions of the contract. See former opinion and cases there cited. Also *Typograph Co. v. Macgurn,* 119 Mich. 533. These principles are set forth more fully in the former opinion and cases there cited, and also in 15 Cyc. 251 *et seq.*, and numerous recent cases there cited, which volume has been received since the former decision was rendered. The following quotations are from this volume.

"An election of remedies is the choice by a party to an action of one of two or more coexisting remedial *rights.* * * * All actions which proceed upon the *theory that the title to property remains in plaintiff* are naturally *inconsistent with* those which proceed upon the *theory that title has passed to defendant.* But there is no inconsistency between different legal remedial *rights* all of which are based upon claim of title to property in plaintiff or all of which are based upon the affirmance of title in defendant. * * * The prosecution of one remedial *right* to judgment or decree, whether the judgment or decree is for *or against plaintiff,* is a decisive act which constitutes a conclusive election, barring the subsequent prosecution of inconsistent remedial rights. * * * By preponderance of authority the *mere commencement of any proceeding to enforce one remedial right,* in a court having jurisdiction to entertain the same, is such a decisive act as constitutes a conclusive election, barring the subsequent prosecution of inconsistent remedial *rights.* * * * In order to constitute a binding election the party must at the time
the election is alleged to have been made have knowledge of
115 the facts from which the coexisting, inconsistent remedial rights arise. * * * A person who prosecutes an action or suit based upon a remedial *right* which he erroneously supposes that he has, and is defeated because of the error, has not made a conclusive election, and is not precluded from prosecuting an action or suit based upon an inconsistent remedial *right.* * * * An election once made, with knowledge of the facts, between coexisting remedial *rights* which are inconsistent is irrevocable and conclusive, *irrespective of intent* (*Clausen v. Head,* 110 Wis. 405) and constitutes an absolute bar to any action, suit, or proceeding based upon a remedial *right* inconsistent with that asserted by the election." The italics are ours.

The plaintiff contends that the election was merely between the remedy by replevin and the remedy by lien suit and that since, as it contends, the lien suit would have been ineffectual, there could not have been an election because there was not two remedies to elect between. But, as shown above, the question is whether there were two or more inconsistent remedial rights, not as to whether if there were two such rights, a particular proceeding adopted by the Plaintiff to enforce one of them would have been successful. Even if the lien

suit had been carried to completion and had failed of success there might still have been an election. See above quotation; also *Renne v. Townsend*, 100 N. W. (Ia.) 48; also *Hickman v. Richburg*, 122 Ala. 638, cited in the former opinion, holding that the bringing of a materialman's lien suit, even though it must necessarily have been ineffectual, amounted to an election and an abandonment of the title reserved on the sale.

It is true that there is more or less confusion in the books in the use of the words "remedies" and "rights" in connection with the doctrine of election, but in general it will be found upon an examination of the cases that where it is held that no election has been made, either there was in fact no right, although one was supposed to exist, for the enforcement of which the action claimed to manifest an election was instituted, or if there was such a right the action was instituted under a mistake of fact, or proceedings were brought
116 on two or more inconsistent rights at the same time, in which case, of course, there was no election. Still most of the cases speak of rights or causes of action as distinguished from mere forms of action. For instance, in *Snow v. Alley*, 156 Mass. 193, upon which the plaintiff relies, the court, by Mr. Justice Holmes, said:

"Election exists when a party has two alternative and inconsistent rights, and it is determined by a manifestation of choice. * * * But the fact that a party wrongly supposes that he has two such rights and attempts to choose the one to which he is not entitled, is not enough to prevent his exercising the other, if he is entitled to that."

In *Butler v. Hildreth*, 5 Met. 49, cited in *Snow v. Alley*, the court said, by Chief Justice Shaw:

"The assignee has an election, not of remedies merely, but of rights. But an assertion of one is necessarily a renunciation of the other. This results from the plain and very obvious consideration, that the assignee cannot affirm the sale in part and disaffirm it in part; if it is to stand as a valid sale the property of the goods remains vested in the purchaser and he remains liable for the price. But if the sale is avoided and set aside, it stands as if it had never been made. * * * What action on the part of the assignee is to be taken as proof of the election? * * * We think that if the assignee commences an action against the purchaser for the price, and causes his property to be attached to secure it, this is a significant act, an unequivocal assertion that he does not impeach the sale but by necessary implication affirms it."

It thus seems that there may be an election not only when the action instituted has not been carried to completion but also where it has been carried to completion unsuccessfully. It is unnecessary, as intimated in the former opinion, to say definitely whether the lien suit could have been carried to completion successfully or not, and in Johnson-Brickman Co. *v.* Mo. Pac. R. Co. 126 Mo. 344, cited by the Plaintiff, it was held that where the action was not carried to completion neither the trial court nor the appellate court
117 could determine whether it could have been carried to completion with success, although the court gave this as one of

the reasons why it should not hold, as it did, that the commencement of an action accompanied by an attachment, if not carried to judgment, would not amount to an election so as to prevent a subsequent action of replevin, which ruling it must be conceded is contrary to the views expressed in our former opinion, but which also in our opinion is contrary to the great weight of authority and to cases refer-ed to by that court and is based upon a confusion as to rights and remedies and upon the idea that to constitute an election there must exist facts amounting to an estoppel *in pais*. Election differs from the various classes of estoppel and rests on the principle that one cannot occupy inconsistent positions. Whether the conclusion reached by that court was nevertheless correct on the ground that the first suit was brought under a mistake of fact no opinion need be expressed.

The petition for a rehearing is denied.

Kinney, McClanahan & Cooper; S. H. Derby and C. A. Galbraith for plaintiff.

J. W. Cathcart and Castle & Withington for defendant.

(Signed) W. F. FREAR.
" A. A. WILDER.

118 491. *Concurring Opinion of Hartwell, J.*

The decision in this case was based upon the theory of a conditional sale, although the court did not say that they regarded the transaction as of that nature. It is only on the theory that the sale was conditional that the question of election can arise.

The facts are as follows: February 12, 1900, the plaintiff agreed to "furnish" to the Kona Sugar Co. and the company agreed to accept in Honolulu certain railway material and equipment at stated prices to be delivered at stated times upon payment of drafts accompanying bills of lading. This agreement was not executed, as the drafts were not paid and the property remained for many months in the plaintiff's possession in Honolulu.

March 13, 1901, the plaintiff agreed with the company that upon payment on the following day of $10,000 with the company's promissory note for $37,044.53 payable in six months with interest at 7½ per cent., secured by its first mortgage bonds of that amount it would deliver to the company "the bills of sale authorizing you to take charge of the rails, locomotives, cars, scales and other materials (now awaiting delivery, upon the express condition and understanding that said rails, locomotives, cars, scales and other materials) are and shall remain the property of William W. Bierce, Limited, until the full payment of the note above described, according to its terms." This was done and the plaintiff "released the bills of lading from the drafts," the railroad equipment "was removed from Honolulu to Kona and the railroad of the Kona Sugar Co. was constructed."

The note was not paid September 14, 1901, when due or afterwards. February 17, 1902, a receiver of the company was ap-

pointed who took possession of its property and carried on
119 the business of its plantation, the company "continually getting deeper into debt and becoming more and more hopelessly insolvent." May 12, 1902, the plaintiff filed in the circuit court a notice of its lien on the railroad equipment and August 1, 1902, nearly a year after the note was defaulted, brought suit against the company and its receiver to enforce the lien, which in January, 1903, it discontinued, and afterwards brought this action of replevin.

By the second agreement the property remained the plaintiff's subject to payment of the note at maturity, upon the happening of which event the company would have become its owner. Upon nonpayment of the note the plaintiff had the undoubted right to claim the property as its own and the equally undoubted right, notwithstanding the non-payment, to hold the company as a purchaser, in the latter case treating the agreement as executed instead of executory, but the two rights being directly inconsistent with each other, both of them could not be exercised either concurrently or successively.

The civilians would have applied to this case the maxim *"Allegans contraria non est audiendus,"* meaning that a man shall not be permitted to "blow hot and cold." If when the plaintiff brought this lien suit it knew that the bonds it held as collateral security for the unpaid purchase money were absolutely of no value, as afterwards was shown, then as a matter of common business sense it would have claimed the property as its own and as not sold to the company, and would not have claimed that it was sold as was necessary to do in bringing a lien suit. It is to be inferred therefore that the plaintiff then considered that it was for its interest to treat the company as a purchaser in order to get some benefit from the bonds. There was no other possible reason for a lien suit, for if successful it could only
have secured to the plaintiff a judgment which would be a
120 preferred claim on the company's plantation; whereas by claiming that the property was unsold it was the property and nothing else which was obtained. Later on, when no other change had occurred in conditions than resulted from the evident worthlessness of the bonds, the plaintiff discontinued its lien suit and claimed then for the first time that under the agreement the property had not been sold. The reason of the rule expressed in the maxim above cited is that when a right may be acquired by asserting it and by such assertion is acquired, the assertion cannot be withdrawn in order to establish an inconsistent right. The lien suit was a formal avowal made in court of the plaintiff's election to treat the transaction as a sale, and it was in no other way than by such avowal or its equivalent that the transaction could have become a sale. On principle it might seem that if the plaintiff simply sent to the Kona Sugar Co. a letter stating that it would hold it liable as a purchaser, this would have been an unequivocal exercise of its right to regard the property as sold, and would suffice to vest in the plaintiff the rights of a seller, and in the company the right as well as the liability of a buyer, which rights the plaintiff could not afterwards change to suit its convenience. The cases, however, do not appear

to go to that extent, although *Woodley v. Coventry*, 2 H. & C. 164, very nearly does so. In that case the defendants had sold 350 barrels of flour, to be taken from a larger quantity, to one Clarke who obtained advances of the plaintiff on the security of the flour and gave the plaintiff a delivery order on the defendants. The plaintiff sent the order to the defendants' warehouse and left it there, the clerk saying "It is all right." The plaintiff sold the flour to different persons and the defendants delivered part, but Clarke becoming bankrupt, refused as unpaid vendors to deliver any more. The plaintiff brought trover and it was contended for the defendants that by their contract with Clarke no property had passed, because
121 the sale was not of any specific flour. The court held that the defendants were estopped from denying that the property had passed.

If a vendor proposes to reclaim property on the ground that it is forfeited to him for non-payment of purchase money his claim should be made clearly and seasonably, and any act of his from which the buyer might properly infer that he did not claim the forfeiture would be an act beyond his recall. Nonperformance of the condition subsequent would not *per se* work a forfeiture, but only upon the vendor's assertion that he claimed it. The condition once waived cannot be revived. But in the case of an executory agreement to sell, the property to pass to the buyer only upon his performance of a condition precedent, namely, upon payment, non-payment does not *per se* work a forfeiture of any right acquired by the intending buyer, for his only right is to acquire the property without paying for it.

But in the one case as in the other, unequivocal words or conduct of the seller showing that he does not treat the property as forfeited or as unsold, and does treat it as sold, would preclude him from afterwards setting up the inconsistent claim that he owned the property and had not sold it. The plaintiff having exercised its option of affirming the transaction as a sale cannot disaffirm its own act.

I concur in the opinion of the court that the case ought not to be reheard.

(Signed) ALFRED S. HARTWELL.

(Endorsed:) Decision. Filed April 29th, 1905. George Lucas, Clerk.

122 In the Supreme Court of the Territory of Hawaii, October Term, 1904.

WILLIAM W. BIERCE, LIMITED,
v.
CLINTON J. HUTCHINS, Trustee.

Replevin.

Motion.

To the Honorable Supreme Court of the Territory of Hawaii:

Now comes the plaintiff herein, by its attorneys Kinney, McClanahan & Cooper and C. A. Galbraith, and moves this Honorable Court that an order be entered in the above cause modifying the decision herein made and filed on January 28, 1905, whereby "the exceptions, so far as they raise the question of election, are sustained, the judgment of the trial court is reversed and the case is remanded to that court for such further proceedings as may be proper," so as to direct that the case be remanded to the Circuit Court with instructions to enter judgment for the defendant with costs.

This motion is based on the record, and on the affidavit of S. H. Derby hereto attached and made a part hereof, and is made in order that plaintiff may have a final judgment entered in the above cause which may be reviewed by a writ of error to the Supreme
123 Court of the United States.

Dated, May 5th, 1905.

WILLIAM W. BIERCE, LIMITED,
By KINNEY, McCLANAHAN & COOPER,
C. A. GALBRAITH (Per S. H. D.),
Its Attorneys.

Notice of Motion.

To Messrs. J. W. Cathcart and Castle & Withington, attorneys for the defendant herein:

Please take notice that we shall present the foregoing motion to the Honorable Supreme Court of the Territory of Hawaii, on Saturday the 6th day of May, 1905, at 10 o'clock a. m. or as soon thereafter as counsel may be heard and ask that the same be allowed.

KINNEY, McCLANAHAN & COOPER,
C. A. GALBRAITH (Per S. H. D.),
Attorneys for Plaintiff.

124 In the Supreme Court of the Territory of Hawaii, October Term, 1904.

WILLIAM W. BIERCE, LIMITED,
v.
CLINTON J. HUTCHINS, Trustee.

Replevin.

Affidavit of S. H. Derby.

ISLAND OF OAHU, *Territory of Hawaii, ss:*

S. H. Derby, being first duly sworn on oath deposes and says: That he is a member of the firm of Kinney, McClanahan & Cooper, attorneys for the plaintiff herein; that he is also the attorney in fact for William W. Bierce Limited, the plaintiff herein; that the plaintiff at the trial of the above cause put on its whole case, and that it will have no further evidence to present at a second trial of said cause in case the same is remanded by this court for further proceedings.

And further affiant sayeth not.

S. H. DERBY.

Subscribed and sworn to before me this 5th day of May A. D. 1905.
[SEAL.] GUSSIE H. CLARK,
Notary Public First Judicial Circuit.

Endorsed: No. —. Supreme Court Territory of Hawaii. Wm. W. Bierce Ltd. *vs.* Clinton J. Hutchins. Motion, Notice and Affidavit. Filed May 6th 1905. Kinney, McClanahan & Cooper 303-305 Judd Bldg. Honolulu Attorneys for —— —— (Office No. —)

125 In the Supreme Court of the Territory of Hawaii, October Term, 1904.

WILLIAM W. BIERCE, LIMITED,
v.
CLINTON J. HUTCHINS, Trustee.

Replevin.

Order Modifying Decision.

Upon the Plaintiff's motion herein filed, supported by affidavit setting forth that it will have no further evidence to present at a second trial of said cause, it is hereby ordered that the decision herein made and filed on January 28, 1905 whereby "the exceptions, so far as they raise the question of election, are sustained, the judgment of the trial court is reversed and the case is remanded to that court for such further proceedings as may be proper," is hereby modified by directing

that the case be remanded to the Circuit Court with instruction to enter judgment for the Defendant with costs.

Honolulu, May 6, 1905.

By the Court

(Sign.) GEORGE LUCAS,
Clerk of the Supreme Court of the Territory of Hawaii.

(Endorsed): Decision, filed May 6, 1905. George Lucas, Clerk.

126 & 127 In the Supreme Court of the Territory of Hawaii, October Term, 1904.

WILLIAM W. BIERCE, LIMITED,
v.
CLINTON J. HUTCHINS, Trustee.

Replevin.

Judgment.

Now, on this 6th day of May 1905, the same being one of the regular court days of the October 1904 Term of said Court, the above cause coming on — further consideration on the plaintiff's motion for a modification of the original decision herein made and filed on January 28, 1905, so as to direct that the above cause be remanded to the Circuit Court of the First Circuit with directions to enter judgment for the Defendant with costs, and said motion having been granted, and said order having been entered on this date.

Now therefore it is considered by the Court and is now, ordered and adjudged, that the judgment rendered in said cause by the Circuit Court of the First Judicial Circuit, Territory of Hawaii, in favor of the plaintiff for the return of the property in controversy in the above cause, or in case the same should not be returned for the value thereof, found to be the sum of $22,000.00 and interest thereon, be and the same is hereby reversed, and the exceptions, in so far as they raise the question of election, are sustained, and the said cause is hereby remanded to the said Circuit Court with directions to enter judgment for the defendant with costs.

Entered this 6th day of May, A. D. 1905.

By the Court.

(Signed) GEORGE LUCAS,
Clerk of the Supreme Court of the Territory of Hawaii.

(Endorsed:) Judgment, filed May 6, 1905. George Lucas, Clerk.

128 Afterwards to wit, on the 13th day of January, A. D. 1906, in the October Term of said Supreme Court of the year 1905 came William W. Bierce, Limited, by its attorney, and filed in the

Clerk's office of said Court an authenticated copy of the order allowing an appeal, which said authenticated copy of the order aforesaid is in the words and figures following to wit:

Supreme Court of the United States.

No. 14, Original, October Term, 1905.

Ex Parte: In the Matter of WILLIAM W. BIERCE, LIMITED, Petitioner.

On consideration of the motion for, leave to file the petition for writs of mandamus or certiorari herein,

It is now here ordered by the Court, that said motion be, and the same is, hereby, granted, and on consideration of the petition and of the record presented therewith it is ordered that an appeal from the judgment of the Supreme Court of the Territory of Hawaii in the case of William W. Bierce, Limited, a corporation, *vs.* Clinton J. Hutchins, Trustee, be, and the same is hereby, allowed on the Appellant giving bond in the penal sum of $1,000 conditioned according to law, and approved by the Chief Justice of said Supreme Court or an Associate Justice thereof.

December 4, 1905.

A true copy.

Test:

(Sig.) JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

[Seal of the Supreme Court of the United States.]

(Endorsed:) Supreme Court of the United States, October Term, 1905. Term No. 14. Original. Order allowing appeal.
129 Filed Dec. 4th, 1905. Filed January 13, 1906. (Sig.) George Lucas, Clerk.

130 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the Territory of Hawaii, Greeting:

Whereas, lately in the Supreme Court of the Territory of Hawaii before you or some of you, in a cause between William W. Bierce, Limited, plaintiff, and Clinton J. Hutchins, Trustee, defendant, wherein the decree of the said Supreme Court, entered in said cause on the 6th day of May, A. D. 1905, is in the following words, viz.:

"Now on this 6th day of May, 1905, the same being one of the regular court days of the October Term of said Court, the above cause coming on for further consideration on the plaintiff's motion for a modification of the original decision herein made and filed on January 28, 1905, so as to direct that the above cause be remanded to the Circuit Court of the First Circuit with directions to enter judgment for the defendant with costs, and said motion having been granted, and said order having been entered on this date.

Now therefore it is considered by the Court and is now ordered and adjudged that the judgment rendered in said cause by the Circuit Court of the First Judicial Circuit, Territory of Hawaii, in favor of the plaintiff for the return of the property in controversy in the above cause, or in case the same should not be returned, for the value thereof, found to be the sum of $22,000.00 and interest thereon, be and the same is hereby reversed, and the exceptions, in so far as they raise the question of election, are sustained, and the said cause is hereby remanded to the said Circuit Court with directions to enter judgment for the defendant with costs.

Entered this 6th day of May, A. D. 1905.

By the Court:

(Signed) GEORGE LUCAS,

Clerk of the Supreme Court of the Territory of Hawaii."

is by the inspection of the transcript of the record of the said Supreme Court, which was brought into the Supreme Court of the United States by virtue of an appeal agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of
:31 our Lord one thousand nine hundred and six, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decree of the said Supreme Court in this cause be, and the same is hereby reversed with costs; and that the said plaintiff, William W. Bierce, Limited, recover against the said defendant Five hundred and eighteen dollars and fifty-seven cents for its costs herein expended and have execution therefor.

And it is further ordered that this cause be, and the same is hereby, remanded to the said Supreme Court for further proceedings in conformity with the opinion of this Court.

April 8, 1907.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and decree of this Court as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 25th day of May, in the year of our Lord one thousand nine hundred and seven.

Costs of Plaintiff.

Clerk	$223.15
Printing Record	275.42
Attorney	20.00
	$518.57

(Signed) JAMES H. McKENNEY,

Clerk of the Supreme Court of the United States.

132 Supreme Court of the United States, October Term, 1906.

Costs of William W. Bierce, Limited, in No. 212.

1905 October Term—Docketing cause and filing record, $5.00; appearance, .25; filing precipe and receipts .75; filing papers, $3.25, filing motion, .25; submission, .20; order, .20; continuance, .25	$10.15
1906 October Term—Transfer, $1.00; appearance, .25; filing precipe .25; filing papers, $4.25; filing briefs, $5.00; argument, .20; judgment, $1.00; filing same, .25; recording, .40; mandate, $5.00; preparing record for printer, etc., $1.95; cost of printing record, $275.42; attorney's docket fee, $20.00; costs and copy, .40	508.42
	$518.57

Fee Book, page 20, 109.
Test:
(Signed) JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Endorsed: File No. 20,109. Supreme Court of the United States. No. 212, October Term, 1906. William W. Bierce, Limited, *vs.* Clinton J. Hutchins, Trustee. Mandate. In the Supreme Court of the Territory of Hawaii. William W. Bierce, Limited, *vs.* Clinton J. Hutchins, Tr. Filed August 16, 1907, at 9:55 o'clock A. M. J. A. Thompson, Clerk.

133 Supreme Court of the United States.

No. 212, October Term, 1906.

WILLIAM W. BIERCE, LIMITED, a Corporation, Appellant,
vs.
CLINTON J. HUTCHINS, Trustee.

Appeal from the Supreme Court of the Territory of Hawaii.

[April 8, 1907.]

Mr. Justice HOLMES delivered the opinion of the Court:

This is an appeal from a decision upon a bill of exceptions in a case tried by the court of first instance without a jury. *Hecht v. Boughton*, 105 U. S. 235. The facts were found by the trial court and certain conclusions of law were stated, which the Supreme Court of the Territory held to be wrong. It sustained the exceptions upon one point which went to the root of the plaintiff's cause of action, and, upon the plaintiff's motion coupled with a statement that it would have no further evidence to present at a second trial, ordered

a judgment for the defendant, in order that the case might be brought to this Court. The findings of fact were taken to be true by the Supreme Court and are not open to dispute, except so far as they depend upon rulings of law, so that the questions for decision here are definite and plain, and there is no need to send the case back for a statement of facts by the Supreme Court, although one should have been made. *Stringfellow v. Cain*, 98 U. S. 610. *Harrison v. Perea*, 168 U. S. 311, 323.

The suit was replevin for certain rails, cars, engines and goods, delivered by the appellant to the Kona Sugar Company, Limited, and sold by a receiver of that company to the appellee with full notice of the appellant's claim. Originally there was a contract for the sale of this property for cash, but the Kona Company having failed to pay, the appellant offerred certain "terms in settlement of the contract" previously made, as follows: "We will take in settlement of this contract the sum of $10,000, U. S. gold coin, and the promissory note of the Kona Sugar Company Limited for the sum of $37,044.53, in favor of William W. Bierce, Limited, payable six months after date at the Whitney National Bank in New Orleans, bearing interest at the rate of seven and one-half per cent. (7½%) per annum and secured by First Mortgage Bonds of the Kona Sugar Company,
Limited, of par value equal to the note, said bonds being
134 portion of a duly authorized issue not exceeding $200,000.
This offer is conditioned upon its acceptance by you, payment of the money and the delivery of the note, with collateral, before 4 P. M. on Thursday, March 14th, A. D. 1901.—Upon such payment being made to us before the hour named, we will deliver to you the bills of sale authorizing you to take charge of the rails, locomotives, cars, scales and other materials now awaiting delivery, upon the express condition and understanding that said rails, locomotives, cars, scales and other materials are and shall remain the property of William W. Bierce, Limited, until the full payment of the note above described, according to its terms." This offer was accepted, this contract took the place of that previously made, and the property was delivered.

For purposes of decision the Supreme Court assumed that, under the foregoing instrument, the passing of title was subject to a condition precedent, but intimated that the majority of the Court thought otherwise, if it had been necessary to decide the point. It was not necessary because the Court was of opinion that, if there was such a condition, it was lost by what was considered an election on the plaintiff's part. The Court below had found that there was no election, and therefore the question was and is whether the acts done by the appellant constituted one as matter of law. If not, then it must be considered whether the sale was on a condition precedent, and those are the two questions of law in the case.

The facts are simple. After the last contract was made the Kona Company got into trouble and a receiver was appointed. The appellant thereupon filed a claim of lien upon the railroad supposed to belong to the Kona Company, for materials used in the construction and equipment of the road, the materials referred to being the prop-

erty in question. On or about August 1, 1902, it brought a suit to enforce this lien and in November of the same year filed a petition in the Kona Company proceedings asking that a decree already made for the sale of all the Kona Company's property should be modified so as to except all liens from the operation of the sale. Only a part of the property was used in the construction of the road and under any circumstances the claim of a lien would have been bad. The lien suit was dismissed, before anything had been done in it, in January, 1903. On February 13 the appellant, by leave of Court, filed a petition in the Kona Company proceedings for an order that the receiver either should pay the amount due upon its note or deliver the property, setting up the contract and alleging that its title to the property still remained. The abortive lien proceedings constitute the election that is supposed to have brought the appellant's title to an end. We have not gone into further particulars because there can be no doubt that to claim a lien upon anything is inconsistent with asserting a title to it, and may be assumed to be sufficient to manifest an election if one is possible. The appellant's allegations in its first petition could give no additional strength to its choice.

Election is simply what its name imports; a choice, shown by an overt act, between two inconsistent rights, either of which may be asserted at the will of the chooser alone. Thus, "if a man maketh a lease, rendering a rent or a robe, the lessee shall have the election." Co. Lit. 145*a*. So a man may ratify or repudiate an unauthorized act done in his name. *Metcalf v. Williams*, 144 Mass. 452, 454. He may take the goods or the price when he has been induced by fraud to sell. *Dickson v. Patterson*, 160 U. S. 584. He may keep in force or may avoid a contract after the breach of a condition in his favor. *Oakes v. Manufacturers' Ins. Co.*, 135 Mass. 248, 249. In all such cases the characteristic fact is that one party has a choice independent of the assent of any one else. But if a man owns property he has no election to transfer it to another. He cannot make the transfer unless the other assents. And equally, if he owns property subject to be divested by the performance of a condition, he has no election to divest it without performance. The other party must assent. Transfer is very different from election, and requires acts of a different import on the part of the owner, and corresponding acts on the part of the transferee.

In the case at bar there is no pretense that the appellant's conduct purported to convey the property to the Kona Company in advance of the performance of the stipulated conditions. The case stands on election alone, and the appellant had no right to elect in the sense of the argument. It could not obliterate the condition and leave the contract in force. It may be that it had an election to avoid the contract altogether, but, if so, it did not attempt to do it. It insisted on the contract as the ground of its claim to a lien for the price of the goods. The election supposed and relied upon is an election to keep the contract in force, but to leave out the reservation of title. It must be kept in mind that the effect attributed to the assertion of the lien is attributed to it as a strictly unilateral act, not as an offer

to which an assent might be presumed. As such an act the appellant could not give it the supposed effect. It is quite true, as we have said, that the assertion of a lien is inconsistent with the assertion of a title, *Van Winkle v. Crowell*, 146 U. S. 42, and, therefore, if a lien had been established by judgment or decree, the title would be gone by force of an adjudication inconsistent with its continuance. But the assertion of a lien by one who has title, so long as it is only an assertion and nothing more, is merely a mistake. It does not purport to be a choice, and it cannot be one because the party has no
136 right to choose. The claim in the lien suit, as was said in a recent case, was not an election but an hypothesis. *Northern Assurance Co. v. Grand View Building Assoc'n*, 203 U. S. 106, 108. The fact that a party, through mistake, attempts to exercise a right to which he is not entitled does not prevent his afterwards exercising one which he had and still has unless barred by the previous attempt. *Snow v. Alley*, 156 Mass. 193, 195.

There remains the question whether the sale was conditional. Such sales sometimes are regulated by statute and put more or less on the footing of mortgages. With the development of its effects there has been some reaction against the Benthamite doctrine of absolute freedom of contract. But courts are not legislatures and are not at liberty to invent and apply specific regulations according to their notions of convenience. In the absence of a statute their only duty is to discover the meaning of the contract and to enforce it, without a leaning in either direction, when, as in the present case, the parties stood on an equal footing and were free to do what they chose.

The contract says in terms that it is conditional and that the goods are to remain the property of the seller until payment of the note given for the price. This stipulation was perfectly lawful. *Harkness v. Russell*, 118 U. S. 663. So that the only question is whether any other provision of the contract is inconsistent with this one or qualifies and explains it as intended to do less than it purports to do when taken alone. *Chicago Railway Equipment Co. v. Merchants' National Bank*, 136 U. S. 268. The fact that possession was to be and was delivered, and that it must have been contemplated that the rails would be put down upon a roadway no doubt assumed, it seems, wrongly, to belong to the Kona Company, had no such effect, as between vendor and vendee. Neither did the requirement of additional security in the form of first-mortgage bonds of the company. It may have been expected that the mortgage would embrace a part or the whole of this property, but there is nothing more common than a provision in a mortgage that it shall apply to and embrace after-acquired property, with sufficient description to ascertain the same and bring it within the mortgage when acquired. And if the mortgage would have been operative at once by way of estoppel in favor of third persons, there was the more reason for exacting an interest under it to save the vendor's rights in that event. Of course the absolute liability for the price, and putting that liability in the form of a note, are consistent with the retention of title until the note is paid. Parties can agree to pay the value of goods upon what con-

sideration they please, *White v. Solomon*, 164 Mass. 516, and when a purchaser has possession and the right to gain the title by payment, he cannot complain of a bargain by which he binds himself to pay and is not to get the title until he does.

137 It was suggested that the ratification of the contract by the Kona Company did not mention the condition. But it got its rights from the contract and, of course, got only such rights as the contract gave. Some other subordinate suggestions were made, but we have disposed of the only questions that are open here.

Judgment reversed.

True copy.

Test:

(Signed) JAMES H. McKENNEY,
[SEAL.] *Clerk Supreme Court, U. S.*

Endorsed: In the Supreme Court of the Territory of Hawaii. William W. Bierce, Limited, *vs.* Clinton J. Hutchins, Trustee. Filed August 16, 1907, at 9:55 o'clock A. M. J. A. Thompson, Clerk.

138 In the Supreme Court of the Territory of Hawaii, October Term, 1906.

WILLIAM W. BIERCE, LIMITED,
vs.
CLINTON J. HUTCHINS, Trustee.

Replevin.

Motion.

Now comes William W. Bierce, Limited, a corporation, plaintiff in the above entitled cause, by its attorney, A. G. M. Robertson, and moves this Honorable Court to make and enter herein a final order in the form hereto attached, overruling the exceptions of the defendant herein, and affirming the judgment heretofore rendered in said cause in and by the Circuit Court of the First Judicial Circuit, in consonance with the opinion of the Supreme Court of the United States, a certified copy whereof is filed herein and herewith, and the mandate and fee bill of said Court also filed herein and herewith.

This motion is based on the record in said cause and upon said opinion, mandate, and fee bill of the Supreme Court of the United States.

Dated, Honolulu, August 16, 1907.

WILLIAM W. BIERCE, LIMITED,
(Signed)
By Its Attorney, A. G. M. ROBERTSON.

139 In the Supreme Court of the Territory of Hawaii, October Term, 1906.

WILLIAM W. BIERCE, LIMITED,
vs.
CLINTON J. HUTCHINS, Trustee.

Replevin.

Order.

Whereas, in the above entitled cause, upon the plaintiff's appeal to the Supreme Court of the United States from the judgment of this Court heretofore rendered herein, in and by which the judgment of the Circuit Court of the First Judicial Circuit was reversed, said Supreme Court did, on the 8th day of April, 1907, render its opinion and issue its mandate reversing the judgment of this Court, with costs, and remanding said cause to this Court for further proceedings in conformity with said opinion.

Now therefore, it is hereby ordered and adjudged that the defendant's exceptions heretofore brought to this Court be and the same are overruled, that the judgment heretofore entered herein in and by the Circuit Court of the First Judicial Circuit in favor of the plaintiff for the return of the property in controversy in said cause, or in case the same should not be returned, for the value thereof, found to be the sum of $22,000, the sum of $1,045, damages for the detention thereof, and costs taxed at the sum of $50.50, be and the same is affirmed.

It is further ordered and adjudged that the plaintiff have and recover of and from the defendant legal interest upon the principal sum of said judgment, exclusive of costs, in case the property in
140 controversy shall not have been returned to plaintiff, amounting to date to the sum of $5,786.82; the sum of $230, expended by plaintiff in procuring and compiling the transcript of record on its said appeal, and the costs of this Court, taxed at $——.

Dated, Honolulu, August —, 1907.

By the Court,

—— ——, *Clerk.*

Endorsed: Supreme Court Territory of Hawaii. October Term 1906. William W. Bierce, Ltd. *v.* Clinton J. Hutchins, Trustee. Motion to enter Final Order. Service of a copy of the within motion admitted this 16th day of August, 1907. Castle & Withington, W. A. Greenwell Attorneys for Clinton J. Hutchins, Trustee. Filed August 16, 1907, at 9:55 o'clock A. M. J. A. Thompson, Clerk. A. G. M. Robertson, Att'y for Pl't'ff.

141 In the Supreme Court of the Territory of Hawaii, October Term, A. D. 1906.

W. W. BIERCE AND COMPANY, Respondents,
vs.
CLINTON J. HUTCHINS, Appellant.

Appeal from the Circuit Court, First Circuit.

Suggestion of Disqualification of Judge.

Now comes the defendant, Clinton J. Hutchins, and suggests to the Court the disqualification of Mr. Justice Ballou in this case, for the following reasons:

1. That he was a member of the firm of Kinney, Ballou and McClanahan, who were not only the attorneys at law of the plaintiff in the original transactions involved in this case, but also were their attorneys-in-fact, representing them and having charge of their interests in these Islands, as appears from the record of this action.

2. That the said Justice drew the instrument under which the plaintiff claims title to the property in suit, and the construction of which is involved and is a matter at issue in the decision of the case.

3. That Mr. Justice Ballou was attorney for W. W. Bierce and Company and argued in this court the case of McChesney *v.* Kona Sugar Company, being an appeal from the order of confirmation of the sale under which the defendant claims title to this prop-
142 erty, said cause being reported in 15 Haw. 710.

Dated, Honolulu, September 30, A. D. 1907.

Respectfully submitted,

(Sig.) JNO. W. CATHCART,
(Sig.) CASTLE & WITHINGTON,
Attorneys for Defendant Clinton J. Hutchins.

Endorsed: Original —. No. —. Supreme Court Territory of Hawaii. W. W. Bierce and Company, Respondents *vs.* Clinton J. Hutchins, Appellant. Suggestion of Disqualification of Judge. Filed August 31, 1907 at 11 a. m. J. A. Thompson Clerk Castle & Withington Attorneys for Defendant.

143 In the Supreme Court of the Territory of Hawaii, October Term, 1906.

WILLIAM W. BIERCE, LTD.
v.
CLINTON J. HUTCHINS, Trustee.

Motion for Final Order.

Argued August 30, 1907; Decided September 10, 1907.

Hartwell, C. J., Wilder and Ballou, JJ.

Practice—further proceedings after decision by Supreme Court of the United States.—The decision of this court sustaining defendant's exceptions upon a decisive point having been reversed by the Supreme Court of the United States, the defendant is entitled to a consideration of the other points presented by his exceptions, so far as they are not concluded by the opinion of the supreme court.

Opinion of the Court by BALLOU, *J.*:

The decision of this court in sustaining the defendant's exceptions, *Bierce v. Hutchins*, 16 Haw. 418; 16 Haw. 717, having been reversed on appeal by the Supreme Court of the United States, *Bierce v. Hutchins*, 205 U. S. 340, counsel for plaintiff files the mandate of the Supreme Court and moves for a final order overruling the exceptions of the defendant herein and affirming the judgment heretofore rendered by the circuit court of the first judicial district.

At the hearing of this motion counsel for defendant made an oral suggestion that Justice Ballou was disqualified to sit in the case, which was afterwards reduced to writing and filed. The
144 grounds suggested are that Justice Ballou was formerly a member of the firm of Kinney, Ballou & McClanahan, who were the attorneys in fact as well as the attorneys at law of the plaintiff in the original transactions out of which this litigation subsequently grew; that he drew the instrument under which the plaintiff claims title to the property in suit, and that he afterwards appeared as attorney for plaintiff in another branch of the litigation, arguing the case of *McChesney v. Kona Sugar Co.*, 15 Haw. 710. There being no suggestion of pecuniary interest or other disqualification within Sec. 84 of the Organic Act, the court overruled the suggestion upon the authority of *Notley v. Brown*, 17 Haw. 393.

This case first came before this court upon a bill of exceptions of the defendant comprising forty-six exceptions, most of which were argued and relied upon. These presented questions relating to the right to amend, to the admission of evidence and to the form of the judgment as well as the questions of election, waiver and conditional sale. This court, however, in sustaining those exceptions involving the question of election found it unnecessary to pass upon the other

points. Upon the petition for rehearing the court stated that for the purposes of the original decision it was assumed that the contract was one of conditional sale, or an executory contract to sell upon a condition precedent.

The Supreme Court of the United States passed upon two points, namely, whether the acts done by the plaintiff constituted an election as a matter of law and whether the sale was on a condition precedent. The opinion concludes: "Some other subordinate suggestions were made, but we have disposed of the only questions that are open here." *Bierce v. Hutchins*, 205 U. S. 340 at 349. The mandate re-
145 verses the decree of this court with costs and concludes, "And it is further ordered that this cause be and the same is hereby remanded to the said supreme court for further proceedings in conformity with the opinion of this court."

No question was made of the right of the plaintiff to a judgment for costs in conformity with the mandate, but we are of the opinion that the plaintiff is not entitled at this stage of the proceedings to an overruling of all of the defendant's exceptions and an affirmance of the judgment. The points decided by the Supreme Court of the United States are, of course, concluded, but the defendant brought other exceptions before this court which were not passed upon owing to the conclusive character of the point erroneously decided in his favor. In obeying a mandate from the supreme court we are at liberty to look at the opinion of that court and to consider and decide any question left open by the mandate and opinion. *Ex Parte the Union Steamboat Co.*, 178 U. S. 317, 319. The defendant should be allowed to present any points raised by his bill of exceptions not covered by the opinion of the Supreme Court of the United States, and the plaintiff's motion, except in so far as it asks judgment for costs, is denied.

A. G. M. Robertson for plaintiff.

D. L. Withington and J. W. Cathcart for defendant.

(Signed) ALFRED S. HARTWELL.
(Signed) A. A. WILDER.
(Signed) SIDNEY BALLOU.

Endorsed: Supreme Court Territory of Hawaii. October Term 1906. William W. Bierce, Limited *v.* Clinton J. Hutchins, Trustee. Opinion. Filed September 10, 1907, at 10:2 A. M. J. A. Thompson, Clerk.

146 In the Supreme Court of the Territory of Hawaii.

WILLIAM W. BIERCE, LIMITED, Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee, Defendant.

Order.

Whereas, in the above entitled cause, upon the plaintiff's appeal to the Supreme Court of the United States from the judgment of

this Court heretofore made and entered herein, in and by which the judgment of the Circuit Court of the First Judicial Circuit was reversed, said Supreme Court did, on the 8th day of April, 1907, render its opinion and issue its mandate reversing the judgment of this Court, with costs, and remanding said cause to this Court for further proceedings in conformity with said opinion:

Now therefore, it is hereby ordered and adjudged that the judgment made and entered in this Court and cause on the 6th day of May, 1905, be and the same is vacated and set aside.

O. K. C. & W.

It is further ordered and adjudged that the plaintiff, William W. Bierce, Limited, recover from and against the said defendant, its costs as taxed in the Supreme Court of the United States amounting to the sum of $518.57, and also its costs herein expended, taxed at $230.00.

It is also ordered that said cause be placed on the calendar for the October 1907 Term for further proceedings.

Dated Honolulu, September 27th, 1907.

By the Court:

[SEAL.] J. A. THOMPSON, *Clerk.*

Endorsed: Supreme Court Territory of Hawaii. William W. Bierce, Ltd. *v.* Clinton J. Hutchins, Trustee. Order. Filed September 27, 1907, at 11:45 A. M. J. A. Thompson, Clerk.

147 In the Supreme Court of the Territory of Hawaii, October Term, 1907.

WILLIAM W. BIERCE, LIMITED,
v.
CLINTON J. HUTCHINS, Trustee.

Exceptions from Circuit Court, First Circuit.

Argued November 11, 1907; Decided December 20, 1907.

Hartwell, C. J., Wilder and Ballou, JJ.

Election—waiver—estoppel.—There can be no waiver of a right which does not exist, consequently a decision that the plaintiff in bringing a lien suit did not show its election of a right to treat the property as sold precludes the possibility of a waiver if not of an estoppel, but the facts in the case do not show estoppel *in pais* or by record.

Replevin—pleading—evidence.—It is not error to allow a plaintiff to amend his petition by increasing the alleged value of the property sought to be replevined or by striking out the word "supplementary" prior to "contract." The exclusion of certain evidence of the condition of the property is not error.

148 Opinion of the Court by HARTWELL, *C. J.*:

This was an action of replevin to recover certain rails, joints, spikes, switches, cars, locomotives, trucks, scales, lumber and materials which the Kona Sugar Company had obtained from the plaintiff for a plantation railway over land of which the company owned the roadway for about one-third of a mile, an undivided interest for a little less than two-thirds of a mile, the rest of the roadway being held by the company partly under a license and partly by lease. The defendant pany partly under a license and partly by lease. The defendant claimed the property as purchaser at a receiver's sale of the Kona Sugar Company's property. The Kona Company obtained possession of the property in question under the following circumstances: February 21, 1900, the plaintiff, by its letter of that date, proposed to the company to furnish the company with the railway equipment and material at stated times and prices upon payment in Honolulu of drafts for the purchase money attached to the bills of lading. The proposal was accepted by the company's agents, M. W. McChesney & Sons, February 22, and the property was shipped by the plaintiff to Honolulu but, the drafts not being paid on presentation, was not delivered to the Kona Company until March 13, 1901, when the plaintiff wrote to the company as follows:

"HONOLULU, H. T., *Mar.* 13, 1901.

"Kona Sugar Company, Limited, Honolulu, H. I.

"GENTLEMEN: In pursuance of the verbal agreement made between your President and William W. Bierce, Limited, we hereby offer the following terms in settlement of the contract between the Kona Sugar Company Limited and William W. Bierce Limited as evidence- by letter dated February 21, 1900, and accepted by the Kona Sugar Company Limited, Feb. 22, 1900.

"We will take in settlement of this contract the sum of $10,000.00, U. S. Gold Coin, and the promissory note of the Kona Sugar Company Limited for the sum of $37,044.53, in favor of William W. Bierce, Ltd., payable six months after date at the Whitney National Bank in New Orleans, bearing interest at the rate of seven and one-half per cent (7½%) per annum and secured by First Mortgage Bonds of the Kona Sugar Company Limited of par value equal to the note, said bonds being portion of a duly authorized issue not exceeding $200,000. This offer is conditioned upon its ac-
149 ceptance by you- company of the money and delivery of the note, with collateral, before 4 p. m. on Thursday, March 14th, A. D. 1901.

"Upon such payment being made to us, before the hour named, we will deliver to you the bills of sale authorizing you to take charge of the rails, locomotives, cars, scales and other materials now awaiting delivery, upon the express condition and understanding that said rails, locomotives, cars, scales and other materials are and shall remain the property of William W. Bierce, Limited, until the full payment of the note above described, according to its terms.

"Very truly yours,

"W. W. BIERCE, LTD.,
"By H. T. GILBERT."

"The above terms are accepted this March 13, 1901.
"THE KONA SUGAR CO., LTD.,
"By Its President, J. M. McCHESNEY."

"[SEAL.] "By Its Treasurer, F. W. McCHESNEY."

"Received on account of above agreement exchange on New York for Ten Thousand Dollars and Seventy-six (76) $500. Bonds of the Kona Sugar Co. Numbered from 1 to 76 both inclusive.
"W. W. BIERCE, LTD.,
"By H. T. GILBERT."

This acceptance by the officers of the Kona Sugar Company was ratified at a directors' meeting held March 16, 1901. The minutes recite that " a written offer from W. W. Bierce Ltd., was read and discussed" and the resolution ratifies "the settlement as made by the President," but the preamble to the resolution, in purporting to state the offer, makes no mention of the reservation of title. Upon the signing March 13 of the acceptance of the proposed terms the plaintiff received from the Kona Company the sum of $10,000 and the company's note for $37,044.53 payable six months after date with interest at seven and one-half per cent. and as collateral thereto seventy-six of the company's first mortgage bonds and thereupon the plaintiff released the bills of lading from the drafts and the property in question was delivered to the Kona Company.

The railroad was then constructed by the Kona Company although a small portion of the material was not used in the construction. The note was not paid at maturity. The plaintiff's agent sent to
150 Honolulu for the purpose of collecting it failed to do so. On March 28, 1902, the company being without funds to carry on its business, harvest its crops or pay the rents for its leaseholds, upon application of certain creditors and by consent of the First American Savings & Trust Company, trustee under a deed of trust by the Kona Company conveying all its property as security for payment of its bonds, a receiver was appointed, with authority to carry on the plantation in order to save the crop, who took possession of the property of the Kona Company and of the railroad equipment.

May 13 the plaintiff filed in the circuit court of the third circuit, in which the receivership proceedings were pending, its "Notice of Lien of Materialman" declaring that it "has a lien on certain property of the Kona Sugar Company," described as "all that certain cutting, embankment, grading and filling, and track, switches, bu ings, cars, engines and other property forming and constituting line, roadway and equipment of the single track railroad of the Kona Sugar Company," for the sum of $37,044.53, and interest for materials furnished by the plaintiff to the Kona Company for the construction and equipment of the said railroad, and August 1 the plaintiff, having obtained leave, brought a lien action against the receiver for recovery of the purchase money. November 24 the plaintiff intervened in the receivership proceedings with its petition setting forth *inter alia* the indebtedness of the Kona Company for materials furnished it to be used, and which in fact were used, in the construc-

tion and equipment of its railroad; that the plaintiff was the owner of $45,000 worth of the first mortgage bonds of the Kona Company secured by a mortgage upon all its property, including the railroad equipment, and praying that the order of sale be modified by excepting "all liens, rights, claims and interest of whatsoever
151 name or nature of all bondholders and of all persons claiming, asserting or seeking to enforce any lien of whatsoever name or nature." January 28, 1903 the plaintiff discontinued the lien action and February 5 it sought and was denied leave to bring against the receiver an action of replevin for the railway property, the plaintiff's theory of a sale being thus changed to that of ownership. The receiver's sale was made and the plaintiff May 30, 1903, filed a protest against its confirmation and moved that it be declared to be no sale on the ground that it purported to include this railroad property. The sale being confirmed the plaintiff appealed to this court solely upon the ground that the judge had no jurisdiction to appoint the receiver or order the sale. *McChesney v. Kona Sugar Co.*, 15 Haw. 710. The jurisdiction being sustained the plaintiff brought a writ of error to the order confirming the sale which was dismissed November 21, 1904, on the ground that it did not appear that any of the property of the plaintiff was ordered to be sold. *Bierce v. McChesney*, 16 Haw. 258. The plaintiff then brought this action of replevin the venue being changed to the first circuit and jury being waived by stipulation. The trial judge gave judgment that the plaintiff recover the property with $1045 damages for its detention and costs, or $22,000, found to be its value, with the same damages for its detention, informing the plaintiff's attorneys that they could prepare what they considered to be the necessary facts leading to this conclusion and present them. Several days later the plaintiff presented, and the judge allowed, seventeen findings of fact and eight conclusions of law as they are termed.

The findings and conclusions are to the effect that February 21, 1900, the plaintiff and the Kona Company made a contract for sale
of this property, that it did not pass to the company's pos-
152 session until after the contract of March 13, 1901, that the payment of $10,000 and the note for $37,044.53, given under that contract, were in settlement of the former contract and not in consideration of the purchase price; that the payment of the note was a condition precedent to divest the plaintiff of its title; that the later contract was entire and incapable of apportionment so as to ascertain the price of lienable and nonlienable items—was a conditional sale and not a chattel mortgage or an absolute sale with lien reserved in the vendor; that some of the property was not used for the railway and was not lienable; that the plaintiff, by the lien suit or generally, had not waived its title to the property or made election of remedies or rights to bar this action or rescind the contract; that the defendant took possession with knowledge of the plaintiff's claim of title; that the value of the property was $22,000 and that the plaintiff had suffered damages from its detention in the sum of $1045, being six per cent. interest on $22,000 from June 1, 1903.

The defendant's bill of exceptions to rulings at the trial, the judg-

ment and the findings and conclusions was brought to this court, argued November 14, 1904, and decided January 28, 1905, (16 Haw. 418,) a petition for rehearing argued March 13 and April 19, being denied April 29. (Ib. 717.) The exceptions were sustained which related to the plaintiff's election by its lien action to treat the property as sold, the judgment of the circuit court being reversed and the cause directed to be remanded for such further proceedings as might be proper.

May 6 the plaintiff moved that the decision of January 28 reversing the judgment of the trial court and remanding the cause for such further proceedings as may be proper be modified "so as to direct that the case be remanded to the circuit court with instructions to enter judgment for the defendant with costs," the object of
153 this motion being stated to be "in order that plaintiff may have a final judgement entered in the above cause which may be reviewed by writ of error to the Supreme Court of the United States." Judgment was entered therefor in form prepared by the plaintiff.

"Now therefore, it is considered by the court and is now ordered and adjudged that the judgment entered in said cause by the circuit court of the first judicial circuit, Territory of Hawaii, for the return of the property in controversy in the above cause, or, in case the same should not be returned, for the value thereof, found to be the sum of $22,000, and interest thereon, be and the same is hereby reversed and the exceptions, in so far as they raise the question of election, are sustained and the said cause is hereby remanded to the said circuit court with directions to enter judgment for the defendant with costs."

May 11 the plaintiff filed a motion stating its desire to appeal to the United States Supreme Court and that in order to give jurisdiction to said court to pass upon the merits of the case "it seems to be necessary that this court should make a statement of the facts of the case in the nature of a special verdict as provided by Act 80, 18 U. S. St. at L., pp. 27 & 28." May 16 the motion was denied "as said cause came up on a bill of exceptions and this court has no jurisdiction to make findings of fact in matters so presented." The plaintiff then moved that the court allow its appeal to the United States Supreme Court, which motion was denied. December 4 the plaintiff obtained an order from Mr. Justice McKenna of the United States Supreme Court that the appeal from the judgment of this court be allowed on the plaintiff giving a bond in the penal sum of $1000 conditioned according to law and approved by the Chief Justice of this court. March 5, 1906, the plaintiff's bond having been approved, it obtained an order from the United States Supreme Court that the bond operate as a supersedeas and that the judgment be superseded accordingly. Upon this appeal the United States Supreme Court reversed the decree (judgment) of this court and remanded the cause for further proceedings, (*Bierce v. Hutchins*, 205 U. S. 340,) whereupon the plaintiff moved for judgment. The defendant, however, insisting upon his right to have such of his
154 exceptions passed upon as are not concluded by the opinion of the court above, this court held that he was entitled to a

consideration of the points presented by those exceptions. *Bierce v. Hutchins*, 18 Haw. 374.

At the time of the decision on the exceptions this was the court of last resort for the case as no federal question was involved and the appellate relations between the courts of Hawaii and the Supreme Court of the United States were not governed by the law applicable to other territories but were identical with the law applicable to states. *Equitable Life Assurance Society v. Brown*, 187 U. S. 308. March 3, 1905, however, Congress amended the Organic Act of April 30, 1900, c. 339, §86 by adding at the end of the section:

"*Provided*, That writs of error and appeals may also be taken from the Supreme Court of the Territory of Hawaii to the Supreme Court of the United States in all cases where the amount involved, exclusive of costs, exceeds the sum or value of five thousand dollars."

The Supreme Court in its opinion takes the view that the proviso added by the act of March 3, 1905, to the previously existing right of review not only puts Hawaii on the same footing as other territories with respect to this class of cases but also puts in force here the practice act of April 7, 1874, ch. 80; 18 Stat. L. 27; 1 Suppl. Rev. Stats. 7. This act purports to deal with appeals from territories which have adopted the code procedure, and its application to a court which has always observed the distinction between common law and chancery procedure in a common law case in which the main decision was rendered before the act was applicable naturally gives rise to many confusing questions.

But no question as to the effect of these statutes arises in this case in the view which we have taken of the defendant's remaining exceptions. He contends (1) that the findings of the trial court,
155 to all of which he excepted, are not supported by the evidence; (2) that if the findings can stand the plaintiff's acts, enumerated above, show its waiver of its right to the property sued for; (3) that by reason of those acts the plaintiff is estopped by its conduct and by the judgments of this court on its appeal from, and writ or error to, the confirmation of the receiver's sale, and also is estopped by the record from claiming the property or asserting ownership thereof.

We are of the opinion that the findings are supported by undisputed evidence in so far as they are findings of material facts and not statements of legal conclusions or immaterial statements varying or contradicting written instruments, and that upon these facts the decision of the Supreme Court is conclusive against the defendant's contention. For instance, the findings especially urged by the defendant to be erroneous are the sixth finding of fact, which also covers the sixth conclusion of law, and the fourth conclusion of law, reading as follows:

"That the contract of March 13, 1901, was an entire contract and intended so to be, for a lump sum consideration, which consideration was incapable of being apportioned so as to make possible the ascertainment of the price of the lienable and nonlienable items thereof.

"That the payment of $10,000 under the contract of March 13, 1901, and the giving of the note therein for $37,044.53 secured by

the bonds of the Kona Sugar Co., Ltd., was in settlement and adjustment of the contract of February 21, 1900, and neither said cash nor said notes and bonds were given as a consideration for the purchase price of the materials sued for."

The construction of the written instrument of March 13, 1901, is plainly a question of law. What it was intended to be by the parties is as plainly immaterial. That the cash payment and the giving of the bonds under said contract was in settlement of the previous contract appears from the face of the written instrument, and the testimony of the officers and agent of the Bierce corporation, relied on by the defendant, to the effect that the agent was endeavoring to collect the purchase price of the material, can have no effect in varying the instrument itself. The matter of segregating the lienable from the nonlienable articles by reference to the contract of February 21 was material only upon the theory, now concluded, that the plaintiff's lien suit affected its rights. The two contracts between the plaintiff and the Kona Company, as well as all the material acts of the plaintiff which are relied upon as constituting election, waiver or estoppel, are matters of documentary evidence, and it was for this reason that this court said: "Upon the question of election in this case the material facts are undisputed and the construction of the contracts, which are in writing, is a matter of law for the court." (16 Haw. 426.) The Supreme Court of the United States likewise said: "The findings of fact were taken to be true by the Supreme Court and are not open to dispute except so far as they depend upon rulings of law," which we construe as meaning, "are not open to dispute in any event" and not, as now contended by the defendant, "are not open to dispute for that reason."

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It appeared to us in considering the case at the former hearing of the defendant's exceptions that the contract of March 13, 1901, was supplementary to that of February 21, 1900, in extending the time of payment of all but $10,000 of the purchase money, securing the balance by the note and bonds, and that the retention of title was for further security by way of mortgage, but the appellate court declared that this contract "took the place of that previously made." Under this decision this court is not at liberty to construe the second contract as merely changing some of the terms of the earlier contract and not as a complete substitution and effacement of that contract.

As to the claim of waiver, the passing of the title being subject to a condition precedent, the subsequent election of the plaintiff to treat the title as having passed and its waiver of the condition precedent are but two aspects of the same question. The matter of waiver was fully discussed in connection with the question of election in the defendant's brief in the Supreme Court as appears by that brief now filed with us and by its summary in the official report. Although the decision of the Supreme Court does not use the term "waiver," it sufficiently appears throughout that waiver of the condition precedent is the matter under discussion, as, for example, when the opinion says "the election supposed and relied upon is an election to keep the contract in force but to leave out the reservation of title." (205 U. S. 347.) If the plaintiff's acts, relied on by the

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defendant, would amount to a waiver under any circumstances, the decision of the Supreme Court proceeds upon the broad ground that the title to goods sold subject to a condition precedent cannot be passed by any unilateral act of the vendor.

Whether the question of estoppel *in pais* is covered by the decision of the Supreme Court or fairly included in its reasoning or not we see no grounds upon which the defendant can claim the benefit of any estoppel. He could not have relied upon prior representation of the plaintiff that this property belonged to the Kona Company for the reason that the plaintiff had receded from that position before the sale took place and at the sale read a protest claiming it as its own.

"If both parties are equally cognizant of the facts and the declaration of one party produces no change in the conduct of the other, there is no estoppel." *Goo Kim v. Holt*, 10 Haw. 66.

There was no estoppel by the judgment confirming the receiver's sale as far as jurisdiction was concerned (15 Haw. 710) nor by the decision that the order of sale failed to show that it included any of the plaintiff's property. (16 Haw. 258.) The question of title in this action was not before the court in those cases and if it had been presented the court probably would have had no jurisdiction in those equitable proceedings to determine the title.

158 The defendant has pointed out that the decision of the Supreme Court concerning the effect of the plaintiff's lien action appears to have been based in part upon the view that the plaintiff had made a mistake as to the ownership of the land on which the railway was built, the court remarking "The fact that a party, through mistake, attempts to exercise a right to which he is not entitled does not prevent his afterwards exercising one which he had and still has unless barred by the previous attempt." (205 U. S. 347.) If the evidence showed, as it does not, that the company owned all instead of about one-sixth of the land over which the railway was made this would not affect the decision that "the assertion of a lien by one who has title, so long as it is only an assertion and nothing more, is merely a mistake." (*Ib.*)

The defendant's exception to the refusal of the trial judge to find separate values for the articles furnished cannot be sustained since the second contract does not mention the prices, and their separate values with reference to that contract are immaterial.

The only exceptions to rulings prior to the judgment on which the defendant relied in argument are (1) to allowing the plaintiff to amend its complaint by changing the averment of the value of the property first from $15,000 to $20,000 and then to $22,000 and by striking out from the complaint the word "supplementary" before the word "contract," and (2) to ruling out certain evidence of Scott, the first receiver, concerning the condition of the property, on the ground that he was not an expert.

The amendments were properly allowed under the statute. (Sec. 1738 R. L.) Before the property was delivered to the plaintiff the defendant obtained a return of it to himself upon his statutory bond in double the value of the property as originally stated by the plaintiff. It does not appear that the defendant's rights were affected by

the amendment increasing the value, and the amendment
159 striking out the word "supplementary" conforms to the ruling that the later contract was substituted for, and in settlement of, the earlier and was not a contract for payment of the purchase money.

As to Scott's testimony. His testimony as to one car being damaged was kept in while his testimony as to the rest of the equipment being in good condition was struck out. Upon objection by the plaintiff that Scott was not an expert as to value the defendant admitted that he was not attempting to prove value. Consequently Scott's testimony was immaterial and the exception should be overruled.

Exceptions overruled.

A. G. M. Robertson for plaintiff.

D. L. Withington (Castle & Withington on the brief) and J. W. Cathcart for defendant.

ALFRED S. HARTWELL,
A. A. WILDER,
SIDNEY BALLOU.

Endorsed: Supreme Court, Territory of Hawaii. October Term, 1907. William W. Bierce, Limited, *v.* Clinton J. Hutchins, Trustee. Opinion. Filed December 20, 1907, at 10:18 A. M. J. A. Thompson, Clerk.

160 In the Supreme Court of the Territory of Hawaii, October Term, 1907.

WILLIAM W. BIERCE, LIMITED, Plaintiff-Appellee,
v.
CLINTON J. HUTCHINS, Trustee, Defendant-Appellant.

Exception from Circuit Court, First Circuit.

Petition for Rehearing.

Clinton J. Hutchins, Trustee, respectfully petitions for a rehearing in the above entitled case from the decision filed January 22, 1906, on the following grounds:

(1) That at the time of the rendition of said decision there was pending in the Supreme Court of the United States a motion for
161 leave to file a petition for mandamus to this court directing it to enter a judgment without further consideration of the exceptions of this petition, which motion had been heard on the 16th day of December, 1907, and was granted at some date, whether before or after said 20th day of December the petitioner is not advised, notice of which motion was duly served upon the members of this court and counsel for petitioner prior to the rendition of said decision, protest and objection having been made in open court by counsel for this petitioner to the rendition of any decision pending the application to the Supreme Court of the United States and the

uncertainty whether that court had reassumed jurisdiction of this cause, and, amongst other reasons, because the rendition of said decision, if adverse, would place this petitioner and his attorneys in the embarrassing position of appearing to take proceedings voluntarily in this court pending proceedings in the Supreme Court of the United States, including the present petition for rehearing.

(2) That the court has overlooked, in its decision of this case, its decision filed January 28, 1905, in this cause, an adjudication binding between the parties, which reversed the findings and judg-
162 ment of the trial court, which reversal of the findings having been had at the time when there was no appeal to the Supreme Court of the United States under the decision of Harrison *v.* Magoon, 205 U. S. 501, was a final and conclusive adjudication between the parties and is the law of the case.

(3) That the court has entirely overlooked, in its decision of this case, that in said opinion and decision of January 28, 1905, it held:

"In our opinion the contract in the present case is not such as to prevent a severance of the price of the lienable items from the price of the nonlienable items. The original contract of February 21, 1900, specifies in detail the various items and the prices of each item as well as other terms relating to delivery, payment, etc. The property was shipped in accordance with the terms of that contract, but the bills of lading and the property were not delivered for the reason that the drafts, which, with the bills of lading, were sent to a third party for collection, were not paid. A supplementary contract was accordingly made March 13, 1901, purporting to be 'in settlement of the contract' previously made. Under this latter arrangement it was agreed that the Kona Sugar Company should pay $10,000 in cash and give its note for the sum of $37,044.53 payable in six months with interest at 7½ per cent. and secured by the Kona Sugar Company's first mortgage bonds as collateral, whereupon the plaintiff was to deliver the property upon the condition that
163 it should remain the property of the plaintiff until the payment of the note. This arrangement was carried out. The total amount, including the cash and the note under this arrangement, was $47,044.53. The aggregate amounts under the first arrangement, it is said, would be about $45,000. Probably the difference between these two amounts covered expenses that had occurred meanwhile for storage or otherwrise. The first of these contracts is made a portion of the second by express reference. They must be construed together. The first shows that the price for at least a portion of the lienable materials may be ascertained."

W. W. Bierce, Limited, *v.* C. J. Hutchins, Trustee, 16 Haw. 418, p. 425.

which, for the reasons set forth in the last paragraph, became the law of the case and conclusive between the parties.

(4) That the court has overlooked, in its opinion in considering the construction of the written instrument of March 13, 1901, and in holding that "what it was intended to be by the parties is as plainly immaterial" and that the acts of the parties can have no effect in

varying the instrument. The well known rule reaffirmed by the Supreme Court of the United States in the recent case of Lowrey *v.* Hawaii, 206 U. S. 206, that extrinsic evidence can be considered, that "there is no surer way to find out what parties meant
164 than to see what they have done."

"And equally obvious and potent is a resort to the circumstances and conditions which preceded a contract. Necessarily in such circumstances and conditions will be found the inducement to the contract and a test of its purpose. The conventions of parties may change such circumstances and conditions, or continue them, but it cannot be separated from them. And this makes the value of contemporaneous construction. It is valuable to explain a statute where disinterested judgment is alone invoked and exercised. It is of greater value to explain a contract where self-interest is quick to discern the extent of rights or obligations, and never yield more than the written or spoken word requires."

(5) That the court has overlooked, in its opinion, in holding that the findings of the trial court are not open to dispute in any event, and not, as we contended, that they were not open to dispute for the reason that they had been adopted for the purpose of the case by the Supreme Court of Hawaii, which we respectfully suggest is a misconstruction of the opinion of the Supreme Court of the United States, in view of the fact that that court cannot go into evidence but must take the ultimate facts found by this court, while this court has a right to determine whether the evidence supports the findings; and
165 further, the court has entirely overlooked the fact that much of the evidence, including especially the evidence of Mr. McClanahan, as to the purpose with which Bierce & Co. acted is not documentary, but oral, and shows an intent on the part of the plaintiff inconsistent with the findings of the trial court and its present contention.

(6) That the court has overlooked in its opinion in passing upon the claim of waiver and in holding that the "subsequent election of the plaintiff to treat the title as having passed and its waiver of the objection precedent are but two aspects of the same question," the distinction pointed out by petitioner in his reply brief and also pointed out by Mr. Justice Holmes in the opinion in this case that election is a choice between two inconsistent rights, either of which may be asserted at the will of the chooser alone, whereas, waiver is merely the intentional relinquishment of a known right and not necessarily a choice between two, that the opinion of the Supreme Court of the United States in this case, holding that there can be no choice where there is only one right, does not apply to the case of a waiver, and further holding that there can be no election to transfer property to another, since the other must consent, does not apply to a waiver where assent is shown or may be presumed, and that in this
166 case the facts show a prior and subsequent assent to the waiver on the part of the vendee.

(7) That the Supreme Court in its opinion has overlooked the point made by appellant, which is supported by the evidence, that, while the title to goods "cannot be passed by any unilateral act of the vendor," the assent of the vendee in this case is shown by repeated acts as well as by its own declaration.

(8) That the court in its opinion has overlooked the contention of the petitioner that there is an estoppel by record in this case, to wit, by the amended decree obtained by the plaintiff on its petition in intervention directing this very property to be sold as the property of the Kona Sugar Co. subject to the mortgage lien and subject to the mechanic's lien, a decree inconsistent with a claim of title to the property itself.

(9) That the court in its opinion has overlooked the point made by us, that there was a pending action at the time of the institution of this action, in which the plaintiff took proceedings after the institution of this action seeking to recover the same property sought to be recovered in this action.

167 (10) That the court in its opinion has overlooked, in ruling upon the exception to the refusal of the trial judge to find separate values for the articles furnished, the point raised by us that, whether the second contract merged the first or not, the first still remained to fix the value of the articles; and the further consideration that this point has already been decided by this court, without right of appeal to the Supreme Court of the United States, in its former opinion, in which it held that the consideration set out in the supplementary agreement merely represents the price shown by the original agreement, less the articles not furnished.

(11) That the court in its opinion overruling the exception of this defendant to the rejection of the testimony of the witness Scott, and holding that Scott's testimony became immaterial because the defendant admitted that he was not attempting to prove value, has overlooked in the testimony that counsel for the defendant at the same time stated that the testimony was material as to deterioration, clearly showing that what counsel admitted was that he was not attempting to prove by the witness Scott, values, viz., what

168 would be the market price or market value of the property in question at the place in exact figures, but to show by a witness who was familiar with and used and had in its possession the property, what was its condition as to deteriorations bearing upon the question of value.

(12) Finally, that the court in its opinion has overlooked the point made by this petitioner that the defendant, C. J. Hutchins, Trustee, was the successor to and had all the rights of the bondholders and the receiver, and that as the evidence shows an estoppel as to the bondholders and the receiver, he was entitled to the benefit of such estoppel.

Respectfully submitted,

(Sig.) CASTLE & WITHINGTON,
(Sig.) JNO. W. CATHCART,
Attorneys for Appellee.

Counsel respectfully certify that the foregoing petition is not interposed for delay, and further certify their belief that the same is well founded in law.

(Sig.) DAVID L. WITHINGTON,
(Sig.) JNO. W. CATHCART,
Counsel for Appellee.

Endorsed: Original. Supreme Court, Territory of Hawaii. October Term, 1907. William W. Bierce, Ltd., Plaintiff-Appellee, *v.* Clinton J. Hutchins, Trustee, Defendant-Appellant. Exception from Circuit Court, First Circuit. Petition for Rehearing. Filed January 8, 1908, at 11:57 o'clock A. M. J. A. Thompson, Clerk.

169 In the Supreme Court of the Territory of Hawaii, October Term, 1907.

No. 15.

WILLIAM W. BIERCE, LTD.,
v.
CLINTON J. HUTCHINS.

Exceptions from Circuit Court, First Circuit.

Petition for Rehearing Filed January 8, 1908; Decided February 10, 1908.

Hartwell, C. J., Wilder and Ballou, JJ.

Per curiam:

The petition for rehearing is denied without argument under Rule 5.

By the Court:

(Signed) J. A. THOMPSON, *Clerk.*

Endorsed: Supreme Court, Territory of Hawaii. October Term, 1907. William W. Bierce, Ltd., *vs.* Clinton J. Hutchins, Trustee. Decision on Petition for Rehearing. Filed February 10, 1908, at 3:55 o'clock P. M. J. A. Thompson, Clerk.

170 In the Supreme Court of the Territory of Hawaii, October Term, 1907.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff-Appellee,
vs.
CLINTON J. HUTCHINS, Trustee, Defendant-Appellant.

Exceptions from Circuit, First Circuit.

Decision on Exceptions.

In the above entitled cause, the defendant's exceptions are overruled, pursuant to the opinion of said Court filed herein December 20, 1907.

Dated Honolulu, March 4th, 1908.

By the Court.

(Signed) J. A. THOMPSON,
Clerk, Supreme Court.

Endorsed: Supreme Court Territory of Hawaii. October Term, 1907. William W. Bierce, Limited, Plaintiff-Appellee, *v.* Clinton J. Hutchins, Trustee, Defendant-Appellant. Decision on Exceptions. Filed March 4th, 1908, at 11:10 o'clock A. M. J. A. Thompson, Clerk.

171 In the Supreme Court of the Territory of Hawaii, October Term, 1907.

WILLIAM W. BIERCE, LIMITED, a Corporation,
v.
CLINTON J. HUTCHINS, Trustee.

Replevin.

Statement of Facts.

(1) Plaintiff is a corporation organized and existing under the laws of the State of Louisiana.

(2) Defendant is a resident of Honolulu, Territory of Hawaii, and a citizen of said Territory of Hawaii.

(3) The Kona Sugar Co., Ltd., is a corporation organized and existing under the laws of the Territory of Hawaii.

(4) On February 22, 1900, plaintiff and Kona Sugar Co., Ltd., entered into the contract evidenced by the following proposal and acceptance:

"HONOLULU, HAWAIIAN ISLANDS, *February* 21, 1900.

"Kona Sugar Company, Hawaiian Islands.

"GENTLEMEN: For the sum of Forty-six ($46.40) Dollars and forty cents per ton of 2,240 pounds, we propose to furnish you with five hundred and fifty (550) tons of first quality steel 'T' rails, weighing 35 lbs. to the yard. Also, to furnish sufficient complete joints to lay said rails for the sum total of Two Thousand Two Hundred and Eighty-one ($2,281.00) Dollars, one complete joint being furnished for each rail; a complete joint consisting of two Angle Bars and four bolts. Also, for the sum of One Thousand Four Hundred and Forty ($1,440.00) Dollars to furnish sufficient 4½" x ½" railroad track spikes to lay the 550 tons of rails with cross ties 2' between centers.

"The above prices are all freight prepaid to Honolulu, the Kona Sugar Company to reimburse Bierce for the insurance to be paid thereon.

"We are also to furnish for the sum of Five Hundred and Forty-five ($545.00) Dollars c. i. f. prepaid to Honolulu, ten sets
172 of 35 pound split switch material complete with Plantation Target Stand, No. 6 Frog, 7' 6" split switch points, tie rods and slide plates; all designed for 3' gauge of track.

Further, to furnish sixteen (16) cars, 28' long, 7' wide, end stakes 5' high above floor line, for 3' gauge of track as per the following

specifications; price to be three hundred and forty ($340.00) Dollars per car c. i. f. prepaid to Honolulu.

Lumber.

6 Longitudinal Sills, 4″ x 8″ Pine.
2 End Sills, 6″ x 10″ Oak; (planking 2″.)
2 Sub End Sills, 5½″ x 6″ Oak.
4 Draft Timbers, 2½″ x 5½″ Oak.
2 Cross Ties, 3″ x 5″ Oak.
6 End Stakes, 4″ x 5″ Oak, 5′ above floor line of car.
Filler blocks of oak.

Construction.

Sills will be mortised and tenoned to fit. Draft timbers will be bolted to both center sills, end sills and sub end sills, and be protected by cast iron mortise blocks. Cross ties will support car in center in conjunction with truss rods. End stakes will be mortised into end sills, and braced with angle or T iron for 3′ of their length. All wood to be coated with mineral paint; all iron work with asphaltum.

No floor planks, or side stakes shall be furnished.

Trucks.

Two Standard Trucks of the diamond type, provided each with four wheels, chilled charcoal iron, 24″ in diameter, 3½″ tread, 275 lbs. each, mounted on axles 3¾″ diameter; journals 3½″ diameter and having solid brass journal bearings. The top arch bar shall be 3″ x 1″, the inverted arch bar 3″ x ¾″ and the tie bars 3″ x ⅝″, bent to shape and drilled ¾″ column and journal box bolts. Journal boxes of cast iron provided with spring lid and hinged at the top. Bolster springs are to be in nests of four each, provided with plates top and bottom of such sizes and dimensions to suit capacity of cars. Truck bolsters shall be I beams and channels—there shall be no woodwork of any kind in the truck proper. Body bolster shall be of steel.

Stake Pockets.

Side stake pockets, 24 in number (12 on each side of the car) of malleable iron for 3½″ x 3½″ stake at top, and diminishing to 3″ x 3″ at bottom. They shall be fastened to outside sill with ⅝″ U bolt, said U bolt passing through filler block to intermediate sills and fastened with nut on cast iron washer.

Ends.

The end stakes shall be tenoned into end sills and braced in front with T or angle iron for 3′ of the stake, and further braced with malleable iron bracket at end of car. Shall be bored for ½″ bolts

to hold planking in position. Shall be held in position at
173 bottom each by two ⅝″ eye bolts, passing through bottom of stake and sill and fastened to intermediate sills.

Draw Gear.

Draw gear consists of cast iron drawheads, wrought iron follower plates, guides, etc., with draw springs and cast iron draw bar stops. Draw timbers are secured to center sills each with two ⅝″ bolts provided with cup washers on top and double nuts and wrought iron washers on bottom. Are further secured to buffer blocks (sub end sills) with four ⅝″ bolts. Drawbar carrier is made of 2¼″ x ⅜″, with ends gibbed to prevent draw timbers from spreading. Buffer block, or sub end sill is faced with plate of 4″ x ⅜″ iron.

Brake.

Car equipped with hand brake on each truck each with end wheel working on end sill.

General.

Lumber entering into the manufacture of this car to be of good merchantable quality. Cars are to be shipped knocked down. All work to be done in a thorough and workmanlike manner. Car Guaranteed for Fifteen (15) Tons Carrying Capacity.

The locomotives to be furnished are as follows:
One 9″ x 14″ Class "A," saddle tank locomotive of the Dickson Locomotive Works make, as per photograph attached, signed by both parties hereto for identification. Price of this locomotive to be Three Thousand Seven Hundred and Fifty Five ($3,755.00) Dollars, c. i. f. prepaid to Honolulu. This locomotive to be for 36″ gauge, marked "Kona Sugar Company," "No. 1," and to be fitted with steam brake.

Also

One 10″ x 16″ Class "M" back truck saddle tank locomotive, with six driving wheels, to be manufactured by the Dickson Locomotive Works, for 36″ gauge, to be fitted with steam brake and duplicate in construction of the "Halawa," photo signed by both parties and attached hereto for identification. The approximate weight of this locomotive ready for service will be 38,000 pounds, 31,500 lbs. of which will be carried on the driving wheels. The driving wheels of this locomotive will be 33″ diameter, whilst those under the trucks will be 18″ diameter. The boiler pressure will be 150 lbs., water capacity 500 gallons, piston rod of machine steel, to have two sand boxes one forward and one back of the driving wheels; to be furnished with balloon shaped stack with spiral cone provided with steel wire netting. Cross head pump to be on right side and injector

on left side. Fire box of steel. Price of this locomotive to be Five Thousand Four Hundred and Ninety-Five ($5,495.00) Dollars c. i. f. prepaid to Honolulu. Locomotive to be marked "Kona Sugar Company, No. 2."

These locomotives will each have two headlights, be constructed for use of either wood or coal as fuel; sold and guaranteed to be of best material, workmanship and design and equal in every degree to locomotive of same size and type built and manufactured by the Baldwin Locomotive Works.

Lastly, there is to be furnished one "Howe" Narrow Gauge Track Scale, to have a capacity of 25 tons, platform 30′ in length—
174 foundation plan to be furnished by us—timber, work and foundation to be furnished by the Kona Sugar Company. Price $500.00 c. i. f. prepaid to Honolulu.

Shipment of one-third of the rails, joints therefor, all the spikes, all the switches, four cars, the 9″ x 14″ locomotive, and the scales from works in four months after acceptance of this proposition; another one-third of the rails, together with the joints therefor, in five months after acceptance of this proposition; the balance of the rails and joints in six months after acceptance of this proposition; the balance of the cars (12) and the 10″ x 16″ locomotive may be shipped at any time to insure delivery at Honolulu December 1st to 15th after signing of contract.

Terms of Payment.

Cash upon presentation of demand draft attached to bill of lading, issued by initial line of railroad, showing material to have been shipped through to Honolulu. Insurance policy shall be transmitted as soon as possible after shipment is made, when it shall be determined just what vessel shall haul the material from port on mainland to Honolulu.

All monies are payable in New York or Chicago funds; the Kona Sugar Company to pay all items of exchange.

Twenty-Five Hundred ($2500.00) Dollars in paid up stock of the Kona Sugar Company shall be the first payment on account of the purchases herein proposed; this $2,500.00 to be covered by 5% deductions from the materials as shipped. Bierce agrees to deposit this $2,500.00 stock of the Kona Sugar Company with the Banking House of Bishop & Company in the City of Honolulu, as guarantee for the final consummation of the contract.

NOTE. Where reference herein is made to Honolulu as point of delivery—if vessels are available about time material is ready to ship sellers will make delivery at Kailua, District of Kona, in the Hawaiian Islands; but this is not to be construed as in any manner obligatory or binding.

This proposition is a confirmation of the verbal one made to the Directors of the Kona Sugar Company at their meeting Saturday, February 17th, 1900, and becomes binding on all parties when accepted by their agents, M. W. McChesney & Sons.

When duly accepted and made binding said contract is amenable to the laws of the Hawaiian Islands in effect at date of signing.

Yours very truly,
(Signed) WILLIAM W. BIERCE, LTD.,
By FRANK DAVIES.

Accepted in duplicate by
THE KONA SUGAR CO., LTD.,
By M. W. McCHESNEY & SONS, *Agents.*

This 22nd day of February, 1900.

175 Truss rods on cars 4 in number, 1" dia upset ends 1⅛" Turnbuckles 1"".

W. W. BIERCE, LTD.,
By FRANK DAVIES."

(5) The property specified in the foregoing contract, hereinafter called the property in question, was shipped by plaintiff to Honolulu, but the drafts not being paid on presentation was not then delivered to the Kona Sugar Co.

(6) Plaintiff sent to Honolulu one H. T. Gilbert, its agent, to collect the price of the property in question and effect a settlement, and the following correspondence took place between plaintiff and Kona Sugar Co.:

HONOLULU, H. I., *March* 13, 1901.

Kona Sugar Company, Limited, Honolulu, H. I.

GENTLEMEN: In pursuance of the verbal arrangement made between your President and William W. Bierce, Limited, we hereby offer the following terms in settlement of the contract between the Kona Sugar Company Limited and William W. Bierce, Limited, as evidenced by letter dated Feb. 21, 1900, and accepted by the Kona Sugar Company, Limited, Feb. 22, 1900:

We will take in settlement of this contract the sum of $10,000, U. S. gold coin, and the promissory note of the Kona Sugar Company Limited for the sum of $37,044.53, in favor of William W. Bierce, Limited, payable six months after date at the Whitney National Bank in New Orleans, bearing interest at the rate of seven and one-half per cent. (7½%) per annum and secured by First Mortgage Bonds of the Kona Sugar Company, Limited, of par value equal to the note, said bonds being portion of a duly authorized issue not exceeding $200,000. This offer is conditioned upon its acceptance by you- payment of the money and the delivery of the note, with collateral, before 4 p. m. on Thursday, March 14th, A. D. 1901.

Upon such payment being made to us before the hour named, we will deliver to you the bills of sale authorizing you to take charge of the rails, locomotives, cars, scales and other materials now awaiting delivery, upon the express condition and understanding that said rails, locomotives, cars, scales and other materials are and shall re-

main the property of William W. Bierce, Limited, until the full payment of the note above described, according to its terms.

Very truly yours,

(Signed) W. W. BIERCE, LTD.,
By H. T. GILBERT.

The above terms are accepted this March 13th, 1901.

THE KONA SUGAR CO., LTD.,
By its President, J. M. McCHESNEY,
By its Treasurer, F. W. McCHESNEY.

176 Received on account of above agreement exchange on New York for Ten Thousand Dollars and Seventy-Six (76) $500-Bonds of the Kona Sugar Co.—numbered from 1 to 76 both inclusive.

(Signed) W. W. BIERCE, LTD.,
By H. T. GILBERT.

(7) On March 13, 1901, Kona Sugar Co. paid the $10,000 and delivered the bonds specified in the above receipt and executed and delivered its promissory note reading as follows:

HONOLULU, H. I., *March* 13, 1901.

$37,044.53.

Six months after date we promise to pay to the order of Wm. W. Bierce, Limited, at the Whitney National Bank of New Orleans La., U. S. A., the sum of Thirty Seven Thousand and Forty four Dollars and 53/100 ($37,044.53) with interest at the rate of seven and one half per cent. per annum until paid, both principal and interest payable in Gold Coin of the United States.

Secured by Bonds of the Kona Sugar Co. of the nominal value of Thirty Eight Thousand Dollars $38,000 (Seventy six Bonds of the value of $500.00 each, numbered from 1 to 76, both numbers inclusive.)

(Signed) THE KONA SUGAR CO., LTD.,
By its President, J. M. McCHESNEY.
By its Treasurer, F. W. McCHESNEY.

Endorsed.

Pay to the order of Harry T. Gilbert

WM. W. BIERCE, LIMITED,
By WM. W. BIERCE, *Pre'd't.*

W. W. BOUDEN,
Sec't'y & Treas.

HARRY T. GILBERT.

WM. W. BIERCE, LTD.
W. W. BOUDEN,
Sec't'y & Treas.

WM. W. BIERCE, LIMITED.
By C. BIERCE, *V. Pres't.*

$7.50 revenue Stamps.

(8) On March 13, 1901, upon the signing of the above acceptance and the delivery of the note, cash and bonds, plaintiff released the bills of lading from the drafts and the property in question was delivered to the Kona Sugar Co.

(9) The acceptance by the officers of the Kona Sugar Co. was ratified at a directors' meeting held March 16, 1901, the minutes of said meeting being as follows:

Minutes of Directors' Meeting Held Mch. 16, 1901.

Present: J. M. McChesney F. W. McChesney W. W. Hall, W. L. Hopper, J. S. Walker & E. O. White.

177 Minutes of Directors Meeting held Jan 31/01 read and approved. A written offer from W. W. Bierce Ltd. was read and discussed, after which the following resolution was read and on motion duly 2nd and unanimously approved.

Honolulu, H. I., *Mch* 16, 1901.

Whereas, the Company is under contract with Messrs. Wm. W. Bierce Co. New Orleans La. for railway material, amounting to about the sum of Forty seven thousand dollars with interest and charges to date, part of which material is now in Honolulu; and

Whereas, an offer was made by the said Wm. W. Bierce Co. through their authorized agent Harry T. Gilbert to accept in payment and security therefor Ten thousand dollars in U. S. Gold and Bonds of the Company to the amount of $38000—taking the company's note for 6 mos. for balance due interest at 7½ per cent. per year—secured by the above mentioned Bonds to the nominal value of thirty eight thousand dollars, and the President agreed to such terms and made payment through the company's agents M. W. McChesney Sons to the said Wm. W. Bierce Co. the sum of ten thousand dollars, and did execute and delivered to them the company's note for $37044.53 duly signed by the President and Treasurer payable in 6 months from this date with interest at 7½% per year till paid, secured by the company's Bonds of the nominal value of thirty-eight thousand dollars (which Bonds were delivered to the said agent of Wm. W. Bierce Co. and receipt taken therefor).

Therefore, Be it resolved that the settlement as made by the President Treas. the action of the President and Treasurer in delivering the Company's bonds in the sum of Thirty Eight thousand dollars as security in settlement therefor, be and the same is hereby approved and ratified by the Directors of the Company.

The following resolutions were then read & on motion duly 2nd were unanimously approved.

Honolulu, H. I., *March* 16, 1901.

Whereas, an offer has been made by Messrs. Bishop & Co. to take Bonds of the company lately authorized to the amount of fifty thousand dollars at 95.

Be it Resolved, That the President and Treasurer be and is hereby to sell and deliver Bonds of the Company of the amount of

fifty thousand dollars at 95 net in accordance with the offer herein made, and apply the proceeds on account of sums due the agents Messrs. M. W. McChesney & Sons by the Company for advances heretofore made.

Be it resolved further that the President and Treasurer be and is hereby authorized without notice from the Directors to sell and deliver any of the remaining portion of the Co's Bonds at not less than 95, and apply the proceeds to the expenses of the Co. or to the liquidation of any of its debts.

HONOLULU, H. I., *March* 16, 1901.

Whereas the Company is indebted to its Agents Messrs. M. W. McChesney & Sons, in the sum of one hundred thousand dollars ($100,000) on open acct, and further sums are required to carry on work of the plantation which the agents promise to make provided the payment of the balance of the company's acct. is secured by Bonds of the Co's, lately authorized,

Be it Resolved, That the Company secure the payment to the Agents of the balance of its acct with them and any further advances made by a mortgage or pledge of the Co's. Bonds of the nominal value of one hundred thousand dollars, and the President and Treasurer are hereby authorized to execute such mortgage in the name and on behalf of the company.

The claim of Mr. Wilgeroth for money due on account of Machinery, was next brought up and action deferred till such time as the Mill was running to its full capacity, and said machinery could be tested.

178 It was moved that the Co. take the offer of Mrs. Greenwell to accept $1000.00 for her claim to lower portion of land now claimed by the Co. Puapuaiki which land she claims a ½ interest in. 2nd and carried unanimously. Meeting then adjourned.

E. O. WHITE,
Sec. Kona Sugar Co. Ld.

(10) The property in question, with the exception of a small portion thereof, was then used by the Kona Sugar Co. in the construction of a plantation railroad seven and one-half miles long of which a little more than six miles was made of the rails from the plaintiff. The company owned the roadway for about one-third of a mile and an undivided interest for a little less than two-thirds of a mile, the rest of the roadway being held by the company partly under a license and partly by lease.

(11) The note of the Kona Sugar Co., Ltd., was not paid at maturity. The plaintiff's agent, Harry T. Gilbert, was sent to Honolulu in the latter part of December, 1901, for the purpose of collecting the money, but failed to do so.

(12) On the occasion of this visit said agent visited the Island of Hawaii and saw the railroad equipment in question being used and operated in constructing and running a plantation railroad of the Kona Sugar Co., Ltd., in connection with its sugar mill, and then saw the locomotives and cane cars in operation in the work of

hauling cane to the mill. The plaintiff had other information from time to time that the property had been so used and that the Kona Sugar Co. was operating this railroad on and as an essential part of its sugar plantation.

(13) On March 28, 1902, the company being without funds to carry on its business, harvest its crops or pay the rents for its leaseholds, upon application of certain creditors and by consent of the First American Savings & Trust Company, trustee under a deed of trust by the Kona Sugar Company conveying all its property as security for payment of its bonds, a receiver was appointed,
with authority to carry on the plantation in order to save
179 the crop, who took possession of the property of the Kona Sugar Company and of the railroad equipment.

(14) On May 14, 1902, the plaintiff filed in the circuit court of the third circuit, in which the receivership proceedings were pending, its "Notice of Lien of Materialman" declaring that it "has a lien on certain property of the Kona Sugar Company," described as "all that certain cutting, embankment, grading and filling, and track, switches, buildings, cars, engines and other property forming and constituting the line, roadway and equipment of the single track railroad of the Kona Sugar Company," for the sum of $37,044.53 and interest for materials furnished by the plaintiff to the Kona Company for the construction and equipment of the said railroad, and August 1 the plaintiff, having obtained leave, brought a lien action against the receiver for recovery of the purchase money.

(15) As a result of conferences between the officers of the Kona Sugar Company and bondholders, stockholders and creditors an agreement among the creditors was entered into May 15, 1902, and a bondholders' committee was appointed for the purpose of superintending the affairs of the corporation which were then in the hands of a receiver. The plaintiff, through its attorneys, participated in the conferences and was a party to the agreement. The committee's agreement was submitted to the court and received its approval and under it for some time the receiver worked.

(16) On November 1, 1902, R. W. McChesney, J. M. McChesney and F. W. McChesney, partners under the name of McChesney & Sons, filed a petition against the Kona Sugar Company and the First American Savings & Trust Company wherein the petitioners prayed *inter alia* that all of the property of the said Kona Sugar Company at that time in the hands of a receiver should be sold subject to all liens of every kind and nature upon the said property at the date of the said receiver's appointment, and on November
5 a decree of sale was filed in said cause.

180 (17) On November 24, 1902, the plaintiff intervened in the receivership proceedings with its petition setting forth *inter alia* the indebtedness of the Kona Company for materials furnished to be used, and which in fact were used, in the construction and equipment of its railroad, that the plaintiff was the owner of $45,000 worth of the first mortgage bonds of the Kona Company secured by a mortgage upon all its property,

including the railroad equipment. The petition claimed that the decree of November 5 was not in conformity with the prayer of the petition in that it made no mention of the reservation of liens, and prayed that the order of sale be modified by excepting "all liens, rights, claims and interest of whatsoever name or nature of all bondholders and of all persons claiming, asserting or seeking to enforce any lien of whatsoever name or nature."

(18) On December 4, 1902, and again by continuance on December 15, 1902, the receiver attempted to sell all the property of the Kona Sugar Company subject to all liens of every kind and nature upon said property at the date of said receiver's appointment, but on neither occasion was there any bid. Upon return having been made of these proceedings the order of sale was vacated and the receiver authorized to enter into a contract for harvesting the growing crop of cane.

(19) On January 28, 1903, the plaintiff discontinued its lien action.

(20) On February 5, 1903, plaintiff applied for leave to bring an action of replevin against the receiver for the property in question which was denied on the ground that no notice had been given to the other parties.

(21) The plaintiff then filed another petition in intervention dated February 12, 1903, alleging the proceedings in the receivership proceedings, the contract of February 21, 1900, the shipment of goods under it, the supplementary contract of March 13,
181 1901, the delivery of the property in question, the default on the note and the insolvency of the Kona Sugar Company. The petition further alleged that title to the property in question was in the plaintiff, that on account of wear and tear and deterioration it was not then worth to the plaintiff to exceed $10,000, and that possession had been demanded from the Kona Sugar Company and the receiver and had been refused. It prayed for the payment of the amount due upon the note or as an alternative the return of the property.

(22) On April 10, 1903, a motion of the plaintiff upon this petition in intervention for the appointment of a commissioner to take the depositions of Columbus Bierce and Harry T. Gilbert was allowed upon the stipulation of all parties interested. The depositions were subsequently taken on September 26, 1903, and by stipulation dated October 27, 1903, were used in the case at bar.

(23) On April 20, 1903, a decree was entered in the receivership proceedings ordering the sale on May 9, 1903, free and clear of all liens and encumbrances of all of the property of the Kona Sugar Company for the purpose of paying the debts and liabilities incurred by the receiver, and, so far as might be in the order of their legal preferment, all liens, claims or demands against the company.

(24) On May 9, 1903, the property described in the decree and order of sale was sold at public auction and bought by the defendant, who was and had for some time been secretary of the Kona Sugar Co., for the sum of $12,250. The plaintiff gave notice at

the sale of its claim of title, and the defendant bought with actual notice thereof.

(25) On May 20, 1903, the answer of the Kona Sugar Company to the petition in intervention dated February 12, 1903, was filed alleging that the so called supplementary contract was executed without authority of the company which never agreed or
182 consented to it, that during the year 1902 the intervener had waived all right or title to the property and all rights it might have had under the supplementary contract and had brought its suit against the company in assumpsit for the amount due on the note, that at all times the supplementary contract had been treated and acted upon by the intervener and the Kona Sugar Company as void and of no effect, that the property was sold absolutely and outright and delivered to the company and that the title has been and now is in the Kona Sugar Company. It was admitted that the note had not been paid and it was alleged that it was secured by bonds still held by the intervener.

(26) On June 1, 1903, an order was entered confirming the receiver's sale of May 9, 1903.

(27) On June 5, 1903, the plaintiff, having protested against the order confirming the sale, appealed to this court from said order, its sole contention in this court being that the circuit judge had no jurisdiction either to appoint the receiver or to order the sale. The appeal was dismissed June 4, 1904. *McChesney v. Kona Sugar Co.*, 15 Haw. 710.

(28) On July 20, 1903, the plaintiff brought the present action of replevin against the defendant.

(29) On August 25, 1903, the plaintiff brought a writ of error to the order of sale of April 20, 1903, which was dismissed November 21, 1904, on the ground that it did not appear that any of the property of the plaintiff was ordered to be sold. *Bierce v. McChesney*, 16 Haw. 258.

(30) On March 7, 1904, at the trial of the present cause, plaintiff was allowed to amend its complaint in the following particulars: (*a*) In Par. 5 by striking out the words "a supplementary contract in writing was" and inserting in lieu thereof the words "said agreement of February 21, 1900, was adjusted and settled by a contract in writing," (*b*) by striking out the word "supplementary"
183 in Par. 6 and 7 before the word "contract" and inserting after said word "of March 13, 1901," (*c*) by increasing the allegation of the actual value of the property from $15,000 to $20,000, (*d*) on March 19, 1904, by again increasing the allegation of the actual value of the property from $20,000 to $22,000.

(31) There was testimony to support the finding of the trial judge that the actual value of the property in question was $22,000 and that plaintiff had suffered damages from defendant's detention of the property in the sum of $1045.

The court is of the opinion that several of the matters upon which the defendant has requested a statement of facts, including extracts from the pleadings in this case, bonds given upon attachment and redelivery of the property, and the suggestion of disqualification of

Mr. Justice Ballou in this court, are matters sufficiently shown by the pleadings and papers in the cause and are not required to be found in the statement of facts in the nature of a special verdict.

Honolulu, May 28, 1908.

(Signed) ALFRED S. HARTWELL.
(Signed) A. A. WILDER.
(Signed) SIDNEY BALLOU.

Endorsed: Supreme Court Territory of Hawaii. October Term 1907. William W. Bierce Limited, a corporation *v.* Clinton J. Hutchins Trustee. Statement of Facts. Filed May 28, 1908 at 11 o'clock A. M. J. A. Thompson, Clerk.

184 In the Supreme Court of the Territory of Hawaii, October Term, 1907.

WILLIAM W. BIERCE, LIMITED, a Corporation, Plaintiff,
vs.
CLINTON J. HUTCHINS, Trustee, Defendant.

Replevin.

Appeal.

The above named defendant, Clinton J. Hutchins, Trustee, conceiving himself aggrieved by the decision made and entered on the 4th day of March, 1908, in the above entitled proceeding overruling the exceptions of this defendant, and by the decision of February 10, 1908, denying his petition for rehearing does hereby appeal from said decisions to the Supreme Court of the United States; and prays that this appeal may be allowed for the reasons specified in the assignment of errors, and that a transcript of the record and proceedings, and papers upon which said orders were made, duly authenticated, excepting that, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict and also the rulings of the trial court on the admission or rejection of evidence when excepted to shall be made and certified by this court and transmitted, together with the transcript, duly authenticated, may be sent to the Supreme Court of the United States.

Dated, Honolulu, Territory of Hawaii, May 7, A. D. 1908.

CASTLE & WITHINGTON,
JNO. W. CATHCART,
Attorneys for Petitioner.

185 And now, to wit, on the 28th day of May, 1908, it is ordered that the appeal be allowed as prayed for.

ALFRED S. HARTWELL,
Chief Justice of the Supreme Court of the Territory of Hawaii.

Service of the within and foregoing appeal and citation and the receipt of a copy thereof admitted this 28th day of May, 1908.

A. G. M. ROBERTSON,
Attorney for William W. Bierce, Limited, a Corporation.

186 [Endorsed:] Original No. — Supreme Court Territory of Hawaii William W. Bierce, Limited, a Corporation, Appellee, *vs.* Clinton J. Hutchins, Trustee, Appellant. Appeal Presented and filed May 7, 1908. J. A. Thompson Clerk. Allowed and issued for service May 28 1908 at 1:25 P. M. J A Thompson Clerk Returned May 28 1908 at 3:15 P. M. J A Thompson Clerk Castle & Withington John W. Cathcart Attorneys for Appellant.

187 In the Supreme Court of the United States.

WILLIAM W. BIERCE, LIMITED, a Corporation, Appellee,
vs.
CLINTON J. HUTCHINS, Trustee, Appellant.

Appeal from the Supreme Court of the Territory of Hawaii.

Assignment of Errors.

Now comes Clinton J. Hutchins, Trustee, Appellant in the above entitled action, and says that in the record of the proceedings in the said action in the Supreme Court of the Territory of Hawaii there is manifest error in this, towit:

1. That said Supreme Court of the Territory of Hawaii erred in overruling appellant's exceptions and in affirming the judgment rendered in said cause by the Circuit Court of the First Judicial Circuit, Territory of Hawaii, against said appellent for the return of the property in controversy in said cause, or, in case the same should not be returned, the value thereof, found to be in the sum of $22,000, and interest thereon.

2. That said court erred in denying appellant's petition for rehearing, and in refusing and failing to pass upon the several grounds set forth in said petition.

3. That there was error in holding that the findings are supported by undisputed evidence in so far as they are findings of material facts and not statements of legal conclusions or immaterial facts varying and contradicting written instruments.

4. That there was error in holding that the findings are
188 supported by undisputed evidence in this: That the Supreme Court of Hawaii, on the 28th day of January, 1905 (16 Haw. 418), decided by its opinion that day rendered that the said findings were not sustained according to the uncontradicted evidence in the case and that at the time of this decision the Supreme Court of Hawaii was the court of last resort for the case, as no federal question was involved, and that said decision became the law of the case and was binding upon all parties.

5. That there was error in holding that upon these facts so found the decision of the Supreme Court of the United States rendered in this action is conclusive against the defendant's contention, and in refusing to consider other facts in the case appearing in the evidence, which facts are decisive in favor of the defendant's contention.

6. That there was error in holding that each and every one of the findings of fact is sustained by the evidence, and particularly that the 6th finding of fact is sustained by the evidence, viz., that the contract of March 13, 1901, was an entire contract and intended so to be for a lump sum consideration, which consideration was incapable of being apportioned so as to make possible the ascertainment of the price of lienable and non-lienable items thereof; and also the 4th and 6th conclusions of law are well taken, that the payment of $10,000, the giving of the note secured by bonds of the Kona Sugar Company was not had or given as a consideration for the purchase price of the material sued for, and that the contract of March 13, 1901, was an entire contract for a lump sum consideration, particularly in view of the fact that said court had, upon the 28th day of January, 1905, decided that said findings were not sustained by the evidence and were erroneous, which findings became the law of the case and conclusive on the parties.

7. That the court erred in holding that what the parties
189 intended the written instrument of March 13, 1901, to be is plainly immaterial.

8. That the court erred in holding that the findings of the trial court are not open to dispute in any event, and not, as contended, that they were not open to dispute in the Supreme Court of the United States, for the reason that they had been adopted for the purpose of the case by the Supreme Court of the Territory of Hawaii, and that this is a misconstruction of the opinion of the Supreme Court of the United States, since that court cannot go into the evidence but must take the ultimate facts found by the Supreme Court of the Territory of Hawaii, while the Supreme Court of Hawaii has the right to determine whether the evidence supports the findings.

9. That the court erred in overruling the exception of this defendant to the judgment as contrary to the law and the evidence and the weight of the evidence, on the ground that the court had no authority to render an alternative judgment or money judgment in an action of this character; and on the further ground that the judgment should show the separate value of the different articles sued for in order that the defendant might return any portion of said articles that he was able to return.

10. That the court erred in overruling the last named exception of this defendant, on the further ground that the entry of the judgment was contrary to the law and the evidence and the weight of the evidence, since the evidence showed that there was another action pending for the same property, viz., an action in intervention to recover the value of the same out of the proceeds of sale.

11. That the court erred in overruling said last named exception of this defendant to the entry of the judgment as contrary to the

law and the evidence and the weight of the evidence, since
190 the evidence showed that this respondent acquired his title at a receiver's sale ordered for the purpose of paying the expenses of a receivership, which receivership was carried on under the direction and for the benefit and at the request of the plaintiff, and, further, for the payment of mortgage bonds secured upon this property, with the knowledge and concurrence of the plaintiff as to the holders of which bonds the plaintiff was estopped to make any claim to the property or the proceeds.

12. That the court erred in overruling said last named exception of this defendant to the entry of the judgment as contrary to the law and the evidence and the weight of the evidence, since the evidence showed that the plaintiff waived its right to re-take said property or to make any claim thereto as against this defendant, the successor in interest to said Receiver, his creditors and said bondholders, as well as said Kona Sugar Company, Limited.

13. That the court erred in overruling the exception of this defendant to the amendment made March 7, 1904, since that amendment changed the character of the action and increased the *ad damnum* from $15,000 to $20,000, materially changing the liability of this defendant and his rights and obligations under the bonds given in said action, and also materially changing the claim of the plaintiff subsequently to the property being re-taken on a redelivery bond.

14. That the court erred in overruling the exception to the finding of the court below that the actual value of the articles sued for was at the time of bringing the action and at the time of judgment the sum of $22,000, on the ground that the said sum was in excess of the amount actually claimed by the plaintiff in the complaint and affidavit; and on the further ground that the finding did not set out the separate value of each different article comprising the property referred to in said finding; and further erred in connection with making said finding in amending the complaint in-
191 creasing the amount claimed from $20,000 to $22,000 in order to conform with the proof over the objection and exception of this defendant.

15. That the court erred in overruling the exception of this defendant to the ruling of the court below in excluding the evidence of the witness M. F. Scott as to the condition of the railway material, and to the exclusion of the evidence of said witness upon the difference in the appearance and condition of the rails and the engines and whether the engines worked less well now than on the day when defendant took possession; and also in striking out the evidence of said witness that, with certain exceptions, the material and equipment was in good working order at the time of the trial.

16. That the court erred in overruling the exception of this defendant to the 4th finding of fact in the Circuit Court, on the ground that the same was not in accordance with the uncontradicted evidence; and on the further ground that at the hearing of this cause in the Supreme Court of the Territory of Hawaii on January 28, 1905, it was determined that said finding was not in accordance with

the evidence, which was a final determination and not subject to appeal to this court.

17. That the court erred in overruling the exception of this defendant to the 6th finding of fact, on the ground that the contract of March 13, 1901, was not an entire contract, nor intended to be, but was a contract supplementary to the contract of February 21, 1900; and, further, that the said Supreme Court of the Territory of Hawaii, on the 28th day of January, 1905, finally determined that said 6th finding of fact was not in accordance with the uncontradicted evidence, which determination was not subject to review by this court.

18. That the court erred in overruling the exception of this defendant to the 11th finding of fact, on the ground that the same was not supported by the uncontradicted evidence in the action;
192 and, further, that this was finally determined by the said Supreme Court of the Territory of Hawaii on the 28th day of January, 1905, and that the same was not subject to review by this court.

19. That the court erred in overruling the objection of this defendant to the 12th finding of fact, on the ground that the same was not supported by the uncontradicted evidence in the action.

20. That the court erred in overruling the exception to the 13th finding of fact, on the ground that the uncontradicted evidence showed a rescission of the contract of March 13, 1901, so far as it sought to reserve the title in the property sued for as against this defendant and the Receiver of said Kona Sugar Company, the creditors of said Receiver and the holders of the mortgage bond of said Company.

21. That the court erred in overruling the exception of this defendant to the second conclusion of law made by the Circuit Court.

22. That the court erred in overruling the exception of this defendant to the fourth conclusion of law.

23. That the court erred in overruling the exception of this defendant to the sixth conclusion of law.

24. That the court erred in overruling the exception of this defendant to the seventh conclusion of law.

25. That the court erred in rendering its decision and judgment in favor of the plaintiff and against the defendant in error for that portion of the property sued for which was attached to the soil, on the ground that the same was a fixture and not the subject of an action of replevin, and on the further ground that the plaintiff *were* estopped to claim said property, the same having been affixed to the soil with its knowledge and consent.

Dated, Honolulu, Feb. 25th, A. D. 1908.

(Sg.) JOHN W. CATHCART,
(Sg.) CASTLE & WITHINGTON,
Attorneys for Clinton J. Hutchins, Trustee, Appellant.

Endorsed: Original No. — Supreme Court of the United States. William W. Bierce, Limited, a Corporation, Appellee, *vs.*

Clinton J. Hutchins, Trustee, Appellant. Assignment of Errors. Filed May 7, 1908. J. A. Thompson, Clerk. Castle & Withington, John W. Cathcart Attorneys for Defendant.

193 In the Supreme Court of the United States.

WILLIAM W. BIERCE, LIMITED, a Corporation, Appellee,
vs.
CLINTON J. HUTCHINS, Trustee, Appellant.

Bond on Appeal.

Know all men by these presents: That I, Clinton J. Hutchins, Trustee, and J. B. Castle and F. B. McStocker, all of Honolulu, in the County of Oahu and Territory of Hawaii, are held and firmly bound unto the above named William W. Bierce, Limited, a corporation, in the full and just sum of One Thousand Dollars, to be paid to the said William W. Bierce, Limited, a corporation, its attorneys, executors, administrators or assigns, for the payment of which well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 28th day of May, 1908.

Whereas, the above named Clinton J. Hutchins, Trustee, has prosecuted an appeal to the Supreme Court of the United States, to reverse the decrees rendered in the above entitled suit by the Supreme Court of the Territory of Hawaii,

Now, therefore, the condition of this obligation is such that if the above named Clinton J. Hutchins, Trustee, shall prosecute
194 said appeal to effect and answer all damages and costs, if he shall fail to make such appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

CLINTON J. HUTCHINS,
Trustee,
(Signed) By His Attorneys, CASTLE & WITHINGTON,
(Signed) J. B. CASTLE,
(Signed) F. B. McSTOCKER.

Approved by
(Signed) ALFRED S. HARTWELL,
Chief Justice of the Supreme Court
Territory of Hawaii.

May 28, 1908.

Endorsed: No. — Supreme Court of the United States. William W. Bierce, Limited a corporation, Appellee *vs.* Clinton J. Hutchins, Trustee, Appellant. Bond on Appeal. Filed May 28, 1908 at 1:25 o'clock P. M. J. A. Thompson, Clerk Castle & Withington, Attorneys for Appellant.

195 In the Supreme Court of the United States.

WILLIAM W. BIERCE, LIMITED, a Corporation, Appellee,
vs.
CLINTON J. HUTCHINS, Trustee, Appellant.

Bond on Appeal.

Know all men by these presents: That I, Clinton J. Hutchins, Trustee, and J. B. Castle and F. B. McStocker, all of Honolulu, in the County of Oahu and Territory of Hawaii, are held and firmly bound unto the above named William W. Bierce, Limited, a corporation, in the full and just sum of one thousand dollars, to be paid to the said William W. Bierce, Limited, a corporation, its attorneys, executors, administrators or assigns, for the payment of which well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 25th day of February, 1908.

Whereas, the above named Clinton J. Hutchins, Trustee, has prosecuted an appeal to the Supreme Court of the United States, to reverse the judgment and orders rendered in the above entitled suit by the Supreme Court of the Territory of Hawaii,

Now, therefore, the condition of this obligation is such that
196 if the above named Clinton J. Hutchins, Trustee, shall prosecute said appeal to effect and answer all damages and costs, if he shall fail to make such appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

(Sg.) CLINTON J. HUTCHINS, *Trustee.*
(Sg.) J. B. CASTLE.
(Sg.) F. B. McSTOCKER.

Approved by

(Sg.) ALFRED S. HARTWELL,
Chief Justice of the Supreme Court of the Territory of Hawaii.

Endorsed: No. — Supreme Court of the United States. William W. Bierce, a corporation, Appellee *vs.* Clinton J. Hutchins, Trustee Appellant. Bond on Appeal. Filed May 29, 1908 at 3:30 o'clock P. M. J. A. Thompson, Clerk Castle & Withington Attorneys for —

197 In the Supreme Court of the United States.

WILLIAM W. BIERCE, LIMITED, a Corporation,
vs.
CLINTON J. HUTCHINS, Trustee, Appellant.

Citation on Appeal.

UNITED STATES OF AMERICA, *ss:*

To William W. Bierce, Limited, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at the City of Washington, within sixty days from the date of this writ, pursuant to an appeal filed in the Clerk's Office of the Supreme Court of the Territory of Hawaii, in a cause wherein Clinton J. Hutchins, Trustee, is appellant, and you, William W. Bierce, Limited, a Corporation, are appellee, to show cause, if any there be, why the judgment in said appeal mentioned should not be corrected, and why speedy justice should not be done to the parties on that behalf.

Witness the Honorable Alfred S. Hartwell, Chief Justice of the Supreme Court of the Territory of Hawaii, this 28th day of May, in the year of our Lord one thousand nine hundred eight.

[Seal Supreme Court, Territory of Hawaii.]

ALFRED S. HARTWELL,
Chief Justice of the Supreme Court of the Territory of Hawaii.

198 [Endorsed:] Original. No. 265. Supreme Court, Territory of Hawaii. William W. Bierce, Limited, a Corporation, Appellee, *vs.* Clinton J. Hutchins, Trustee, Appellant. Citation on Appeal. Filed and issued for Service May 28 1908 at 1:25 a. m. J. A. Thompson, Clerk. Returned May 28, 1908 at 3:15 p. m. J. A. Thompson, Clerk. Castle & Withington, John W. Cathcart, Attorneys for Appellant.

199 In the Supreme Court of the Territory of Hawaii.

Volume 2.

Clerk's Minutes.

P. 276. FRIDAY, *Aug.* 16, 1907.

Court convened at 10 o'clock A. M.
Present on the Bench: Hon. Alfred S. Hartwell, C. J., Hon. A. A. Wilder and Hon. S. M. Ballou, JJ.

S. C., No. 265. To page 278.

WILLIAM W. BIERCE, LTD.,
v.
CLINTON J. HUTCHINS ET AL.

Motion by Plaintiff for Entry of Final Order.

Appearances.

A. G. M. Robertson for Plaintiff-Movant.
W. A. Greenwell representing the firm of Castle & Withington for Defendants-Contra.

On call of the above entitled cause Mr. Roberston rose and stated to the Court that he is ready to have the motion taken up at any time next week.
Mr. Greenwell suggested to Mr. Robertson in open Court to have the matter set for Tuesday.
In response to a question propounded by Chief Justice Hartwell counsel replied that there will be opposition to the motion.
In response to a question asked by Justice Ballou as to whether this case was remitted from the United States Supreme Court, Mr. Robertson replied in the affirmative.
200 Mr. Robertson also stated that he had no objection to the motion being set for Tuesday.
The Court ordered the hearing of motion set for Tuesday, August 20.

MONDAY, *Aug.* 19, 1907.

P. 278. Court convened at Ten o'clock A. M.
Present on the Bench: Hon. Alfred S. Hartwell, C. J., Hon. A. A. Wilder and Hon. S. M. Ballou, JJ.

S. C., No. 265. From page 276 to page 286.

W. W. BIERCE, LIMITED,
v.
C. J. HUTCHINS ET AL.

Immediately after the Court convened this day and after the Justices had taken their seats, Mr. Withington rose and stated to the

Court that a motion in the above case has been set for tomorrow, that Mr. Cathcart who is the senior counsel for Mr. Hutchins has been sick at home, stating further that he (Withington) received a note from said Mr. Cathcart stating that he will be out tomorrow; and Mr. Withington then suggested that the cause be set for Thursday, and in addition thereto stated that A. Lewis, Jr., who represents Mr. Waterhouse wishes to be present and take part and that he (Lewis) will be engaged all this week in the Federal Court and that he suggested next Monday; Mr. Withington in concluding stated that Mr. Robertson counsel for the plaintiff is agreeable to having the matter set for next Monday, so also himself.

The Court ordered the matter set for next Monday August 26, subject to previous assignments.

201 MONDAY, *Aug.* 26, 1907.

P. 286. Court convened at 10 o'clock A. M.

Present on the Bench: Hon. Alfred S. Hartwell, C. J., Hon. A. A. Wilder and Hon. S. M. Ballou, JJ.

S. C., No. 265. From page 278 to page 293.

W. W. BIERCE, LIMITED,
v.
C. J. HUTCHINS ET AL.

Motion by Plaintiff for Entry of Final Order.

Appearances.

A. G. M. Robertson for the Motion.
D. L. Withington, of the firm of Castle & Withington, contra.

The above entitled matter having been on to-wit, August 19, continued to this day and hour for hearing, upon its being called by the Court this day, Mr. Withington rose and addressed the Court in words as follows: "In that matter may it please your Honors, Mr. Cathcart who was sick in bed to Tuesday and got out of bed has gone to Kona to try a case, an important case of Carter, Trustee, with the Receivers of the Parker Ranch before Judge Matthewman, he expects to get back on Tuesday."

Following Mr. Withington, Mr. Robertson said that in conversation with the Chief Justice, he (Robertson) had told him that Mr. Cathcart wanted to have the matter set for Friday, stating further that he had no objection to having the matter continued for a reasonable time.

Mr. Withington again rises and asks for one or two days for Mr. Cathcart to prepare, and that Friday is satisfactory to him providing Mr. Cathcart returns Tuesday.

The Court ordered the matter continued until Friday, August 30.

202 FRIDAY, *Aug.* 30, 1907.

P. 293. Court convened at 10 o'clock A. M.

Present on the Bench: Hon. Alfred S. Hartwell, C. J., Hon. A. A. Wilder and Hon. S. M. Ballou, JJ.

S. C., No. 265. From page 286 to page 307.

WILLIAM W. BIERCE, LIMITED,
v.
CLINTON J. HUTCHINS, TRUSTEE.

Hearing on Plaintiff's Motion for Entry of Final Order.

Appearances.

A. G. M. Robertson for the Motion.

D. L. Withington of the firm of Castle & Withington and J. W. Cathcart, contra.

The above entitled motion having been on to wit, August 26, set for this day and hour for hearing upon its being called by the Court, and in reply to a question asked by Chief Justice Hartwell as to whether counsel had any suggestions to make, Mr. Withington rose and addressed in substance as follows: "We like to suggest to the Court the question whether or not Mr. Justice Ballou is disqualified to sit in this case, having drawn the original instrument which is in controversy here?"

In further reply to a question asked by the Chief Justice as to whether he (Withington) claimed that as a disqualification he replied, that he raises that point and wishes to make the suggestion that it is not precluded by the Notley decision.

Mr. WITHINGTON (continuing): "Let me make the suggestion as to the pecuniary interest of Justice Ballou: supposing, for instance it should be declared this did not constitute a conditional sale under the circumstances it will be a question as to liability
203 of the attorney who drew it which might be a pecuniary interest in the case; we intend to claim on the facts that the question is whether this is a conditional sale is not concluded by the Supreme Court."

At the conclusion of Mr. Withington's remarks, Mr. Justice Ballou proceeded and stated his connection herein in substance; that he drew the instrument in question when he was with the firm of Kinney, Ballou & McClanahan and at that time acted for W. W. Bierce, Limited, in the matter, that his connection with the firm of Kinney, Ballou & McClanahan ceased in October 1901, and that this litigation was started long after the date above set forth."

Mr. WITHINGTON: I desire also to call Mr. Justice Ballou's attention to the fact of his connection with this litigation, not this identical case and was engaged by Hackfeld & Co."

Mr. Justice Wilder here interposed the question, whether or not the Chief Justice and himself are disqualified if this is in the nature of a new trial under the Organic Act.

The Court ordered counsel to file the objections in writing.

Mr. Justice Ballou here remarked that in the Hackfeld matter he does not remember whether that was passing upon the title, he remarked further that he remembers of looking through some abstracts.

Mr. Withington again rose and stated that they will file in writing the suggestion of disqualification.

Following Mr. Withington's remarks, the Court ruled that so far no showing has been made as to the disqualification of Mr. Justice Ballou, and it remarked that it does not see any reason why the Court should await the preparation of the suggestion unless counsel desired time.

204 Mr. Cathcart stated and asked that they would like time to submit the suggestion in writing.

Mr. Withington stated that they will be ready this afternoon.

Mr. Robertson in reply to a question directed to him by the Court as to whether he would object to a continuance, he stated that he would not object and stated further that if the matter goes over at all, to have it go over until next week.

The Court again directed counsel to file the suggestion in writing and as far as this question is concerned that the written objection specifying the grounds be filed; and then the Court here informed counsel that the question as to whether this is a new trial does not arise now.

Following the above proceedings, Mr. Robertson rose and proceeded to read the motion also the form of order attached to said motion and at 10:20 A. M., Mr. Robertson proceeded with his argument in support of the motion and concluded such argument at 10:27 A. M.

At 10:28 A. M. Mr. Withington commenced with his argument, concluding at 11:3- A. M. and he was followed by Mr. Cathcart who concluded at 11:35 A. M.

A. Lewis, Jr., of the firm of Smith & Lewis being present in Court during all of the foregoing proceedings when here asked by the Chief Justice if he appeared as counsel in said case, stated that he does not appear in this case and that he was only a spectator; he also stated that there is a case in which he is interested in, depending upon the result of this case.

At 11:37 A. M. Mr. Robertson commenced with his reply argument concluding at 11:52 A. M.

Mr. Cathcart replies briefly and contended that the plaintiff's motion be granted and judgment for costs against the defendant

205 be entered and have the case set for further argument on the exceptions not concluded by the opinion of the United States Supreme Court.

Motion submitted and taken under consideration.

TUESDAY, *Sep.* 10, 1907.

P. 307. Court convened at 10 o'clock A. M.
Present on the Bench: Hon. A. A. Wilder, J.

S. C., No. 265. From page 293 to page 338.

WILLIAM W. BIERCE, LIMITED,
v.
CLINTON J. HUTCHINS, Trustee.

Motion for Entry of Final Order.

The Court this day hands down its written opinion in the above entitled matter, the concluding statement of the Court in said opinion being in words as follows: "The defendant should be allowed to present any points raised by his bill of exceptions not covered by the opinion of the Supreme Court of the United States, and the plaintiff's motion, except in so far as it asks judgment for costs, is denied."

MONDAY, *Oct.* 14, 1907.

P. 338. Court convened at 10 o'clock A. M.
Present on the Bench: Hon. Alfred S. Hartwell, C. J., Hon. A. A. Wilder and Hon. S. M. Ballou, JJ.

S. C., No. 265. From page 307 to page 340.

WILLIAM W. BIERCE, LIMITED,
v.
CLINTON J. HUTCHINS, Trustee.

Exception from Circuit Court, First Circuit.

Upon call of the above entitled cause by the Court and in
206 reply to a question asked by the Court relative to the briefs herein, Mr. Robertson stated that he was served with the defendant's brief on last Saturday and that opposite counsel have consented that he have two weeks within which to file his brief.

Mr. Justice Ballou suggested that counsel file a written consent.

Mr. Withington one of the counsel for the defendant in the above entitled case being also present in Court, stated to the Court that he had acquiesced that Mr. Robertson have two weeks in which to file his brief and further stated that the written acknowledgment on the brief of the service thereof sets forth the consent herein referred to.

THURSDAY, *Oct.* 17, 1907.

P. 340. Court convened at 10 o'clock A. M.
Present on the Bench: Hon. Alfred S. Hartwell, C. J., Hon. A. A. Wilder and Hon. S. M. Ballou.

Upon convening of the Court this day Chief Justice Alfred S. Hartwell read the following order, to wit:

"In the Supreme Court of the Territory of Hawaii.

"Order Setting Cases.

"The following cases are hereby set for hearing on Monday, November 4, 1907, at 10 o'clock, unless otherwise ordered upon motion:

S. C., No. 259. To page 349.

"10. Alice K. Kaae *v.* Kaula Richardson *et al.*

S. C., No. 260. To page 349.

"11. *In Re* Application of F. R. Lueweiko for a Writ of Mandamus against James W. Pratt, Commissioner of Public Lands of the Territory.

S. C., No. 262.

"13. John D. Moore *v.* Clinton G. Ballentyne *et al.*

S. C., 265. From page 338 to page 348.

"15. Wm. W. Bierce, Ltd., *v.* Clinton J. Hutchins, Trustee.

207 S. C., No. 5. From page 329 to page 350.

"At the same time case No. 14, Frederick J. Lowrey, *et al.*, Trustees, *v.* Territory, will be set for hearing on a date certain."

By the Court:

J. A. THOMPSON, *Clerk.*"

October 17, 1907.

MONDAY, *Nov.* 4, 1907.

November Session, 1907.

P. 348. Court convened at 10 o'clock A. M.
Present on the Bench: Hon. Alfred S. Hartwell, C. J., Hon. A. A. Wilder and Hon. S. M. Ballou, JJ.

S. C., No. 265. From page 340 to page 356.

WILLIAM W. BIERCE, LIMITED,
v.
CLINTON J. HUTCHINS, Trustee.

Exceptions from Circuit Court, First Circuit.

Appearances.

A. G. M. Robertson for Plaintiff-Appellee.
D. L. Withington of the firm of Castle & Withington and J. W. Cathcart for Defendant-Appellant.

Following the handing down of the opinions of the Court in Peacock *v.* Rothwell and in Territory *v.* Ah Sing and 67 others, Chief

Justice Hartwell proceeded and addressed the members of the Bar present, stating in substance, "that before taking up the motion noticed for this morning (*In Re* Ching Tai for a Writ of *Habeas Corpus*) he would refer to the cases for argument; that Mr. Catheart has just told him that he feels too ill to go on with the Bierce-Hutchins case which was set some time ago for today and asked for a continuance for one week.

208 Mr. Withington in response to a question directed to him by the Court whether he would join the request for continuance answered in the affirmative.

Mr. Robertson in reply to the Court stated that he had no objection to the case going over.

The Court ordered the case continued until next Monday for argument, at 10 o'clock A. M.

MONDAY, *Nov.* 11, 1907.

Court convened at 10 o'clock A. M.

Present on the Bench: Hon. Alfred S. Hartwell, C. J., Hon. A. A. Wilder and Hon. S. M. Ballou, JJ.

P. 356.

S. C., No. 265. From page 348 to page 388.

WILLIAM W. BIERCE, LIMITED,
v.
CLINTON J. HUTCHINS, Trustee.

Exceptions from Circuit *Fourt*, First Circuit.

Hearing.

Appearances.

A. G. M. Robertson for Plaintiff-Appellee.

D. L. Withington of the firm of Castle & Withington and J. W. Catheart for Defendant-Appellant.

The above entitled case having been on to-wit, November 4, continued to this day for hearing upon its being called by the Court at 10:12 A. M., Mr. Withington rose and opened to the Court stating the case and then followed with his argument concluding at 11:38 A. M.

At 11:40 A. M. Mr. Catheart also representing the de-
209 fendant-appellant rose and commenced with his argument continuing until 12:4 P. M. when the Court took a recess until 2 o'clock this afternoon.

Afternoon Session.

Court reconvened at 2 o'clock P. M.
Present on the Bench: Hon. Alfred S. Hartwell, C. J., Hon. A. A. Wilder and Hon. S. M. Ballou, JJ.

S. C., 265.

WILLIAM W. BIERCE, LIMITED,
v.
CLINTON J. HUTCHINS, Trustee.

Exceptions from Circuit Court, First Circuit.

Hearing Resumed.

Same Counsel Present.

Immediately upon reconvening of the Court, Mr. Withington opened to the Court in reply to a question asked by Mr. Justice Ballou relative to power of attorney herein, concluding at 2:5 P. M.
At 2:6 P. M. Mr. Cathcart resumed with his argument concluding at 2:38 P. M.
At 2:40 P. M. Mr. Robertson commences with his argument concluding at 3:20 P. M.
At 3:24 P. M. Mr. Withington commenced with his reply argument concluding at 3:40 P. M.
Case submitted and taken under advisement.
At 3:41 P. M. the Court adjourned until 10 o'clock next Thursday morning November 14.

210 FRIDAY, *Dec.* 20, 1907.

P. 388.

Court convened at 10 o'clock A. M.
Present on the Bench: Hon. Alfred S. Hartwell, C. J., Hon. A. A. Wilder and Hon. S. M. Ballou, JJ.

S. C., No. 265. From page 356 to page 438.

WILLIAM W. BIERCE, LIMITED,
v.
CLINTON J. HUTCHINS, Trustee.

Exceptions from Circuit Court, First Circuit.

Appearance.

D. L. Withington of the firm of Castle & Withington and John W. Cathcart for Defendant-Appellant. No appearance of or for Plaintiff-Appellee.

Immediately upon convening of the Court this day and after the Justices had taken their seats Chief Justice Hartwell proceeded and

addressed the counsel present in the above entitled case stating in substance, that the Court have prepared and have signed their opinion and were about to announce it this morning, he further stated that he received yesterday papers, an application for the issuance of a Writ of Mandamus to this Court and that he had sent the papers to Mr. Robertson the local attorney for the plaintiff herein and that he returned the papers with a reply that he does not know anything about them and before concluding Chief Justice Hartwell asked counsel as to what they had to say in view of the matter being brought up in the United States Supreme Court.

Mr. Withington replying stated that he had also received the papers yesterday afternoon and have had very little time to examine them; he further stated that the proceedings now sought is to review the opinion rendered by Justice Ballou for that in the petition
211 for Writ of Mandamus said opinion is set out in full, Mr. Withington further said that it seemed to him to be inappropriate to take any further proceedings here in the case until the United States Supreme Court has disposed of the application and that the application raises the point as to the scope of the judgment of the United States Supreme Court.

Following Mr. Withington, Mr. Cathcart rose and argued contending that in view of the fact that the United States Supreme Court has issued an alternative Writ of Mandamus to this Court, that this Court should withhold further proceedings until the United States Supreme Court has disposed of the application.

After remarks of counsel the Court said that it does not see anything in the petition for mandamus which leads it to think that the United States Supreme Court will take jurisdiction and thereupon it ruled that it will announce its decision. The Court here hands down its written opinion in the above entitled case overruling the exceptions.

MONDAY, *Feb.* 3, 1908.

February Session, 1908.

Court convened at 10 o'clock A. M.

Present on the Bench: Hon. Alfred S. Hartwell, C. J., Hon. A. A. Wilder and Hon. S. M. Ballou, JJ.

P. 438.

S. C., No. 265. From page 388 to page 449.

WILLIAM W. BIERCE, LIMITED,
v.
CLINTON J. HUTCHINS, Trustee.

Exceptions from Circuit Court, First Circuit.

Appearances.

A. G. M. Robertson for Plaintiff.
212 D. L. Withington of the firm of Castle & Withington for Defendant.

Counsel for the respective parties in the above entitled case being present in Court, Chief Justice Hartwell addressed them and asked

them if they had heard anything about the application for a Writ of Mandamus in said case.

Mr. Robertson replying said that he had heard nothing definite.

Mr. Withington also replied stating that he had received a letter from a Mr. Brown stating that he (Brown) had seen Mr. Aldrich, continuing, Mr. Withington stated that the matter was coming up on the 29th of January.

In reply to a question asked by the Court as to whether it has been ascertained that an alternative writ has issued or not, Mr. Withington said that nothing has been done, excepting that plaintiff has been granted leave to file an application. Mr. Withington in further reply to a question by the Court as to whether his client or himself has been served with the alternative writ, replied in the negative, adding that he had also received a cablegram, and proceeded to detail from memory the contents of the cablegram.

MONDAY, *Feb.* 10, 1908.

Court convened at 10 o'clock A. M.

Present on the Bench: Hon. Alfred S. Hartwell, C. J., Hon. A. A. Wilder and Hon. S. M. Ballou, JJ.

P. 449.

S. C., No. 265. From page 438 to page 520.

WILLIAM W. BIERCE, LTD.,
v.
CLINTON J. HUTCHINS, Trustee.

Exceptions from Circuit *Circuit*, First Circuit.

213 Upon convening of the Court this day Chief Justice Hartwell rendered an oral decision of the Court on the Petition for Rehearing heretofore filed by the defendant in the above entitled case on the 8th day of January 1908, in words, following to wit: "The motion for rehearing or petition for rehearing in Bierce against Hutchins will be denied, a memorandum decision to that effect will be filed during the morning."

TUESDAY, *May* 12, 1908

P. 520. Court convened at 10 o'clock A. M.
Present on the Bench: Hon. Alfred S. Hartwell, C. J., Hon. A. A. Wilder and Hon. S. M. Ballou, JJ.

S. C., No. 265. From page 449.

WILLIAM W. BIERCE, LIMITED,
v.
CLINTON J. HUTCHINS, Trustee.

Exceptions from Circuit Court, First Circuit.

Hearing Re Settlement of Findings of Fact.

Appearances.

Henry W. Prouty and A. G. M. Robertson for Plaintiff.
D. L. Withington and J. W. Cathcart for Defendant.

Upon call of the above entitled cause, Mr. Withington at 9:2 A. M. proceeded and argued in detail the proposed findings of fact presented on behalf of the defendant in said cause, concluding such argument at 9:35 A. M.
Following Mr. Withington, Mr. Prouty proceeded with his argument concluding at 9:52 A. M.
Mr. Cathcart argued concluding at 9:58 A. M.
Mr. Prouty replied briefly concluding at 10 A. M.
Submitted and taken under consideration.

214 In the Supreme Court of the Territory of Hawaii.

WILLIAM W. BIERCE, LIMITED,
vs.
CLINTON J. HUTCHINS, Trustee.

Replevin.

Præcipe Designating Parts of the Record to be Included in the Transcript.

To J. A. Thompson, Clerk of the Supreme Court of the Territory of Hawaii:

You are requested to make a transcript of the record in the above entitled cause, which said transcript is to be filed in the Supreme Court of the United States pursuant to an appeal taken and allowed in said cause, and to include in such transcript of record the following papers and exhibits, to wit:

1– 48 Defendand's Bill of Exceptions.
49– 61 Bill of Complaint, together with and annexed thereto as exhibits thereof, are Exhibit "A," Contract between W. W. Bierce Limited and Kona Sugar Co., dated Mar. 13, 1901, and Exhibit "B," Note, dated March 13, 1904, for $37,044.53 executed by the Kona Sugar Co. payable to W. W. Bierce, Ltd.
62– 63 Term Summons and Return of Service of same.
64– 65 Replevin Bond.
66– 69 Affidavit of E. B. McClanahan together with and annexed thereto, being Notice to High Sheriff to take possession also Returns of Albert McGurn, Deputy Sheriff of Honolulu and J. K. Nahale, Deputy Sheriff of North Kona, Hawaii.
70– 71 Return Bond.
72– 73 Answer of Defendant.
74– 75 Motion to Amend.
76– 77 Stipulation and Order transferring cause from the 3rd. Circuit to the 1st. Circuit.
78– 81 Plaintiff's Request for Findings of Fact and Conclusions of Law filed March 15, 1904, and Order allowing the same.
82– 83 Plaintiff's requested Conclusions of Law and Order allowing the same.
84– 85 Decision of Hon. J. T. Debolt, dated March 19, 1904.
86– 88 Judgment, dated March 19, 1904.
89– 90 Defendant's Bond on Exceptions to the Supreme Court.
91 Order granting defendant fifteen days after completion of transcript of evidence within which to present Bill of Exceptions.
92– 93 Defendant's Motion for New Trial together with and annexed thereto is Notice of Motion.
94–102 Opinion of Supreme Court of Hawaii, rendered January 28, 1905.

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103–107 Petition and Motion by Plaintiff for Rehearing and Reargument, filed February 25, 1905; annexed thereto is the affidavit of S. H. Derby.
108 Request for further Argument, dated April 13, 1905.
109 Clerk's Minutes Supreme Court of Hawaii, dated March 13, 1905.
110–121 Opinion Supreme Court of Hawaii, and concurring opinion of Hartwell J. rendered April 29, 1905.
122–124 Motion by Plaintiff to modify decision filed January 28, 1905; annexed thereto is Notice of Motion and Affidavit of S. H. Derby.
125 Order Modifying Decision.
126–127 Judgment Supreme Court of Hawaii entered May 6, 1905.
128–129 Order of United States Supreme Court allowing appeal, filed January 13, 1906.

130–137 Mandate of United States Supreme Court dated May 25, 1907; annexed thereto is Fee Bill and Printed Opinion of the United States Supreme Court rendered April 8, 1907.
138–140 Motion by Plaintiff to enter Final Order; annexed thereto is a form of order (unsigned).
141–142 Suggestion of Disqualification of Judge.
143–145 Opinion Supreme Court of Hawaii rendered September 10, 1907, upon the Motion for Final Order.
146 Order Supreme Court of Hawaii vacating and setting aside judgment, entered May 6, 1905.
147–159 Opinion Supreme Court of Hawaii, rendered December 20, 1907.
160–168 Petition for Rehearing, filed January 8, 1908.
169 Decision Supreme Court of Hawaii on Petition for Rehearing, rendered February 10, 1908.
170 Decision on Exceptions.
171–183 Statement of Facts, filed May 28, 1908.
184–186 Appeal by defendant to the Supreme Court of the United States, together with and annexed thereto Order Allowing the Appeal and Acknowledgment of service of Appeal and Citation on Appeal.
187–192 Assignment of Errors.
193–194 Bond on Appeal to United States Supreme Court.
195–196 Second Bond on Appeal to United States Supreme Court.
197–198 Citation on Appeal.
199–213 Clerk's Minutes Supreme Court of Hawaii, of dates August 16, 19, 26, 30, September 10, October 14, 17, November 4, 11, December 20, 1907; February 3, 10, May 12, 1908.

Respectfully,
(Sig.) J. W. CATHCART,
CASTLE & WITHINGTON,
By R. V. MITCHELL,
Attorneys for Defendant.

Endorsed: Original No. 265 Supreme Court Territory of Hawaii. William Bierce, Limited, Plaintiff, *vs.* Clinton J. Hutchins, Trustee, Defendant. Præcipe Filed June 15, 1908, at 10:45 o'clock A. M. J. A. Thompson, Clerk. Castle & Withington, Attorneys for Clinton J. Hutchins.

216 In the Supreme Court of the Territory of Hawaii, October Term, 1907.

WILLIAM W. BIERCE, LIMITED, a Corporation, Appellee,
vs.
CLINTON J. HUTCHINS, Trustee, Appellant.

Clerk's Certificate to Transcript of Record.

TERRITORY OF HAWAII, *Island of Oahu, ss:*

I, J. A. Thompson, Clerk of the Supreme Court of the Territory of Hawaii, do hereby certify, that the foregoing pages numbered from 1 to 183 inclusive, pages numbered 187 to 196 inclusive and pages numbered 199 to 213 inclusive, are full, true and correct copies of the papers, document, entries, decrees as the same are on file and of record in my office as Clerk of said Supreme Court of the Territory of Hawaii in a cause entitled William W. Bierce, Limited, a Corporation, Plaintiff-Appellee, *versus* Clinton J. Hutchins, Trustee, Defendant-Appellant, constituting a transcript of the proceedings and judgment and instead of the evidence at large a statement of the facts of the case together with the rulings of the Court on the admission and rejection of evidence, and herewith transmitted to the Supreme Court of the United States in pursance of the Præcipe of the Attorneys for the appellant a copy of which is attached hereto being pages numbered from 214 to 215 inclusive.

I do hereby certify that the Original Appeal of Clinton J. Hutchins, Trustee to the Supreme Court of the United States, together with and annexed thereto, the Original Order Allowing the Appeal and Acknowledgment of service of Appeal and Citation on Appeal, being pages numbered from 184 to 186 inclusive, and the Original
217 Citation on Appeal being pages numbered from 197 to 198 inclusive are hereto attached and herewith returned.

In witness whereof I have hereunto set my hand and affixed the Seal of the Supreme Court of the Territory of Hawaii, this 15th day of June, A. D. 1908, at my office in Honolulu, in the Island and County of Oahu.

[Seal Supreme Court, Territory of Hawaii.]

J. A. THOMPSON,
Clerk Supreme Court of the Territory of Hawaii.

Endorsed on cover: File No. 21,243. Hawaii Territory, supreme court. Term No. 447. Clinton J. Hutchins, trustee, appellant, *vs.* William W. Bierce, Limited, a corporation. Filed June 30, 1908. File No. 21,243.

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Office Supreme Court, U. S.
FILED.
OCT 31 1908
JAMES H. McKENNEY,
Clerk.

No. 447.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1908.

CLINTON J. HUTCHINS, Trustee,

Appellant,

vs.

WILLIAM W. BIERCE, Limited, a Corporation,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

Motion by Appellee to Dismiss or Affirm under Rule 6, and Brief and Argument in Support Thereof.

CHARLES H. ALDRICH,
HENRY S. McAULEY,
HENRY W. PROUTY,
SOLICITORS FOR APPELLEE.

BARTLETT & WILDER, PRINTERS, HONOLULU.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1908.

No. 447.

CLINTON J. HUTCHINS, TRUSTEE,
Appellant,

vs.

WILLIAM W. BIERCE, LIMITED, A CORPORATION,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

Motion by Appellee to Dismiss or Affirm under Rule 6.

Now comes William W. Bierce, Limited, a corporation, the appellee herein, and moves the court to dismiss the appeal in the above entitled cause for want of jurisdiction because it is apparent upon the face of the record that all the matters or issues attempted to be raised herein were finally adjudicated by the decision of this court between the same parties in No. 212 at the October term, 1906, of this court and reported in 205 U. S. 340.

And the said appellee further moves the court to affirm the said judgment or decree from which said appeal purports to have been taken, because, although the record in said cause may show that this court has jurisdiction in the premises, yet it is manifest that said appeal was taken for delay only, or that the question attempted to be raised for the purpose of giving this court jurisdiction is so frivolous as not to need extended argument.

CHARLES H. ALDRICH,
HENRY S. MCAULEY,
HENRY W. PROUTY,
Counsel for W. W. Bierce, Limited.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1908.

NO 447.

CLINTON J. HUTCHINS, TRUSTEE,
Appellant,

vs.

WILLIAM W. BIERCE, LIMITED, A CORPORATION,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

BRIEF AND ARGUMENT.

STATEMENT OF FACTS.

The record in the present case, as well as the former record in this court between the same parties, determined here in April, 1907, and reported in 205 U. S., 340, shows a most persistent and aggravated attempt to prolong litigation and defeat the manifest rights of the appellee.

William W. Bierce, Limited, a corporation of Louisiana, recovered a judgment in an action of

replevin against Clinton J. Hutchins, trustee, on March 12, 1904, for the return of certain locomotives, cars, rails, etc., previously sold by the plaintiff to the Kona Sugar Company, Limited, a Hawaiian corporation under a conditional sale contract. (Rec., 102-103.)

Upon the trial of the case, the court was requested to make written findings of fact and conclusions of law, which was done. The findings were in favor of the plaintiff, the appellee here, and judgment awarding a return of the property in controversy forthwith, and on failure to make such return that the plaintiff recover its value, found to be $22,000, together with damages for detention, fixed at $1,045 and costs. (Rec., 49.)

From this judgment an appeal was prosecuted by Hutchins to the Supreme Court of the Territory of Hawaii (Rec., 50) which court reversed the judgment of the trial court in an opinion filed January 28, 1905 (Rec. 53), and which is set out at length in the present record (Rec., 53-58) as it was also in the former record.

A motion for rehearing was filed on February 25, 1905 (Rec., 59-61), upon which the court requested oral argument April 13, 1905 (Rec., 62), which was decided April 29, 1905 (Rec., 63). The court's opinion on the rehearing was set forth at length in the former record and is also found in the present record. (Rec., 63-70.) The counsel for the plaintiff advised the court that upon the reversal there would be no further evidence (Rec., 71) and the court, on May 6, 1905, reversed the order of the lower court

with directions to enter judgment for the defendant, with costs. (Rec., 73.)

The court will note that the Supreme Court announced its opinion on January 28, 1905, but entered no order disposing of the case until May 6, 1905.

On March 3, 1905, the organic act of the Territory of Hawaii was amended so as to give a right of appeal as in other territories in all cases involving five thousand dollars, exclusive of costs. (33 Stat., 1035.)

The plaintiff below, as shown in the opinion of this court and the former record, applied to the Supreme Court of the territory on May 11, 1905, for the allowance of an appeal to this court and to that end tendered a finding of facts and conclusions of law, which it asked the court to adopt or find the facts and its conclusions of law in its own manner. This the court refused to do,—and, also, the court refused to allow an appeal. On June 22, 1905, another petition for appeal of similar import was again filed, which was denied on the same day.

The Bierce Company then filed its petition for mandamus or *certiorari* in this court, and on December 4, 1905, this court entered an order granting an appeal from the judgment of the Supreme Court of the territory reversing the lower court (Rec., 74), which appeal was duly perfected.

The court in Hawaii was about to proceed with the trial of the cause on the replevin bond, whereupon the plaintiff, on February 28, 1906, filed in this court a motion that the bond given on appeal stand as a supersedeas bond, and that all proceedings in

the Hawaiian courts be stayed, pending the decision on the appeal case. This motion was sustained in this court.

The appeal case was heard in this court in March, 1907, and decided April 8, 1907, resulting in the reversal of the decision of the Supreme Court of the Territory and mandate accordingly. (Rec., 74-75.)

Thereupon the plaintiff, Bierce Company, moved in the Supreme Court of the Territory for a final order in the form submitted, overruling the defendant's exceptions and affirming the alternative judgment of the trial court for the return of the property, or in default for its value, with damages for its detention, as ascertained on the former trial. (Rec., 80-81.)

The defendant, Hutchins, first filed objections to Mr. Justice Ballou, sitting in the Supreme Court on the consideration of this motion for the reason that he had been of counsel for the Bierce Company, in the early stages of the litigation, had drawn the conditional sale contract, etc. The Supreme Court of the territory (opinion by Ballou J.) overruled the objection to the competency of Mr. Justice Ballou to sit on this motion as to the character of the mandate to the trial court made necessary by the mandate of this court upon the authority of Section 84 of the Organic Act and the decision in *Notley* v. *Brown*, 17 Haw., 393. (Rec., 83.)

The court further held that this court in deciding the issues upon appeal only passed upon two points, "namely, whether the acts done by the plaintiff constituted an election as a matter of law, and whether

the sale was on a condition precedent." (Rec., 84.) It therefore held that the defendant, Hutchins, upon a retrial "should be allowed to present any points raised by his bill of exceptions not covered by the opinion of the Supreme Court of the United States" and denied plaintiff's motion, "except so far as it asks judgment for costs" (Rec., 84), and entered its order accordingly. (Rec., 84-85.)

Instead of remanding the cause for a new trial, it directed that the cause be placed on the calendar for the October, 1907, term for further proceedings (Rec., 85) and at the October term, 1907, it proceeded to the consideration of such findings of fact and conclusions of law as under its decision were not concluded by the former appeal in this court.

When advised of this action of the Supreme Court of the territory, the Bierce Company applied to this court for leave to file a petition for mandamus, and an order was allowed on December 23, 1907, by this court, directing the Chief Justice and Associate Justices of the Supreme Court of the Territory of Hawaii to show cause on January 27, 1908, why the prayer of the petition should not be granted.

The fate of this order to show cause is uncertain. No return was ever made. The court was evidently advised of the application, judging by the minutes of the proceedings. (Rec., 125, 126.)

The court then proceeded to pass upon the remaining exceptions favorably to the Bierce Company. The general history of the litigation is given in the opinion of the court (Rec., 85-93) and a statement is made, "exceptions overruled." (Rec., 93.)

The defendant, Hutchins, filed a petition for rehearing on January 8, 1908 (Rec., 93-97), in which the pendency of the mandamus proceedings in this court is urged as a reason why the court should not have proceeded with the hearing of the so-called undetermined exceptions.

It was also urged as a ground for rehearing that the opinion of the court of the territory rendered on January 28, 1905, (which was not followed by any order of court embodying the views of the court until May 6, 1905), had conferred vested rights upon the petitioner, Hutchins, and become the law of the case, and consequently the subsequent proceedings under the act of March 3, 1905, by which this court reversed the territorial court, were nugatory. (Rec., 94.)

The petition for rehearing was denied (Rec., 97) and an order entered overruling defendant's exceptions (Rec., 97), whereupon the court filed a statement of facts (Rec., 98-109) and the defendant, Hutchins, prayed and was allowed an appeal to this court.

By agreement of counsel the cause is advanced under Rule 26, and the appellee moves to dismiss for want of jurisdiction or to affirm.

BRIEF.

I.

THE ADOPTION BY THE SUPREME COURT OF THE TERRITORY OF THE FACTS AS FOUND BY THE TRIAL COURT WAS A SUBSTANTIAL COMPLIANCE WITH THE ACT OF APRIL 7, 1874, CHAPTER 80; AND, CONSEQUENTLY, THE EXCEPTIONS, IN SO FAR AS THEY RAISE QUESTIONS OF FACT, WERE FINALLY DISPOSED OF BY THE SUPREME COURT IN THE JUDGMENT OF MAY 6, 1905.

Bierce v. *Hutchins*, 205 U. S., 340, 344.
Stringfellow v. *Cain*, 99 U. S., 610.
Harrison v. *Perea*, 168 U. S., 311, 323.
Kelsey v. *Crowther*, 162 U. S., 404, 409.

II.

BY SUSTAINING THE EXCEPTIONS OF LAW, IN SO FAR AS THEY RAISED THE QUESTION OF ELECTION, THE SUPREME COURT OF THE TERRITORY MUST BE DEEMED TO HAVE OVERRULED ALL THE OTHER EXCEPTIONS.

Weyer v. *Beach*, 79 N. Y., 409.

III.

IT IS IMMATERIAL WHETHER OR NOT THE SUPREME COURT OF THE TERRITORY ACTUALLY PASSED UPON THE OTHER EXCEPTIONS; EVERY QUESTION OF LAW RAISED IN THAT COURT BY THE APPELLANT WAS PRESENTED IN THE

RECORD AND WAS BEFORE THIS COURT ON THE APPEAL, SO THAT ITS DECREE THEREON WAS FINAL.

Tyler v. *Magwire*, 17 Wall., 263, 283.
Stewart v. *Salamon*, 97 U. S., 361.
Sibbald v. *U. S.*, 12 Pet. (U. S.), 488, 492.

See, also:

Matthews v. *Columbia Bank*, 100 Fed., 393.
Supervisors v. *Kennicott*, 94 U. S., 498.
Illinois v. *Ill. Cent. R. R. Co.*, 184 U. S., 77, 91.

IV.

ALTHOUGH THIS COURT DISAGREED WITH THE SUPREME COURT ON THE QUESTION OF ELECTION, STILL, IF ANY OF THE OTHER EXCEPTIONS OF LAW RAISED BY THE APPELLANT IN THE SUPREME COURT AND PRESENTED BY THE RECORD WERE WELL TAKEN, THIS COURT WOULD HAVE AFFIRMED THE JUDGMENT.

Reed v. *McConnell*, 133 N. Y., 425.

V.

ALL THE QUESTIONS OF FACT HAVING BEEN FINALLY SETTLED BY THE JUDGMENT OF THE SUPREME COURT OF THE TERRITORY OF MAY 6, 1905, AND ALL THE QUESTIONS OF LAW HAVING BEEN FINALLY SETTLED BY THIS COURT ON THE APPEAL, THE ACTION OF THE SUPREME COURT IN REFUSING TO ENTER A FINAL ORDER AFFIRMING THE JUDGMENT OF THE TRIAL COURT AND IN PLACING THE CAUSE ON ITS CALENDAR FOR FURTHER HEARING OF THE DEFENDANT'S EXCEPTIONS WAS A PLAIN VIOLATION OF THE MANDATE OF THIS COURT; THE

COURT WAS WITHOUT JURISDICTION IN THE PREMISES AND THE MOTION TO DISMISS OR AFFIRM SHOULD BE SUSTAINED.

VI.

IN ALL SUCH CASES WHERE PARTIES APPEAL FROM A DECREE ENTERED IN ACCORD WITH THE MANDATE OF THIS COURT THE APPEAL WILL BE DISMISSED.

Stewart v. *Salamon*, 97 U. S., 361.

United States v. *New York Indians*, 173 U. S., 464, 472, 473.

Aspen Mining & Smelting Co. v. *Billings*, 150 U. S., 31, 37.

Texas & Pacific Railway Company v. *Anderson*, 149 U. S., 237, 242.

In re Sanford Fork & Tool Co., 160 U. S., 247, 255, 259.

Gaines v. *Rugg*, 148 U. S., 228, 242, 243, 244.

In re Washington & Georgetown Railroad Co., 140 U. S., 91.

ARGUMENT.

I.

It is our contention that the Supreme Court of the Territory of Hawaii must be held to have concurred with the trial court in all the findings of fact and conclusions of law except only those pertaining to the question of election between inconsistent remedies, when it entered its judgment of May 6, 1905. When, therefore, this court reversed the action of the Supreme Court of the territory and remanded the cause for further proceedings in accord with its opinion, there was nothing left for the lower court to do except to set aside its previous order reversing the lower court. This action was of such a ministerial character as neither to involve nor require any investigation into the question whether Mr. Justice Ballou was disqualified to sit as a part of the court, either under the Organic Act of the Territory of Hawaii or those general principles everywhere governing the administration of justice under American government. And, finally, that the point made that the appellant here had acquired vested rights by reason of the opinion filed by the Supreme Court of the territory January 28, 1905, so that the act of March 3, 1905, by which an appeal to this court was prosecuted, was nugatory as to the rights of the parties to this controversy,—is manifestly frivolous.

The record shows that the court itself was not satisfied with its opinion of January 28, 1905, and heard argument against it on March 18, 1905; and again on April 13, 1905, in writing requested a reargument (Rec., 62) which took place April 18, 1905 (Rec., 63), whereupon it wrote another opinion which it filed April 29, 1905. (Rec., 63.) This plainly shows that the matter was *sub judice* until long after the enactment of the law under which the appeal was prosecuted to this court.

No citation is necessary to establish the proposition that we must look to the court's orders to ascertain its acts, not to its opinions,—and we have already noted the fact that no order of reversal was entered until May 6, 1905.

If there had been anything in this question it was counsel's duty to raise it in the prior appeal in this court and it is now too late for them to do so.

We submit that our contention that the action of the Supreme Court of the territory in legal effect adopted all other findings and conclusions of the trial court except only those in relation to the question of election received the approval of this court and is now the law of the case.

In our original brief in No. 212, October term, 1906 (p. 22) and in the answer to the reply brief of appellee (pp. 2-3) as well as in our argument at the bar of the court, we urged this view. This court said (205 U. S., 344):

> "The findings of fact were taken to be true by the Supreme Court and are not open to dispute, except so far as they depend upon rulings of law, so that the questions for decision here

> are definite and plain, and there is no need to send the case back for a statement of facts by the Supreme Court, although one should have been made. *Stringfellow* v. *Cain*, 99 U. S., 610; *Harrison* v. *Perea*, 168 U. S., 311, 322."

Any other conclusion would burden this court with successive appeals. The Supreme Court of the territory could as in this case seize upon two (XXVII and XXVIII) of the exceptions and reverse the case; upon being reversed in this court, it could select any other two or three exceptions and again reverse; if again reversed here, the process could be again repeated, until the entire forty-six exceptions had been passed upon or one had been found in which this court concurred in the conclusion of the lower court. It was upon this view of the case that we applied for the writ of mandamus in December, 1907, and that this court, as we assumed, entered its order directing the lower court to show cause.

The other decisions of this court cited in the brief herein, under Point I, illustrate and sustain this view of the rights of the parties.

It is the necessary implication of law that an order sustaining certain exceptions to a master's report, or certain exceptions to a court's conclusions of law, and remaining silent as to other exceptions taken at the same time, must be construed as overruling the exceptions not referred to. This must certainly be so if the action of the court is followed by a final decree disposing of the controversy.

There is another view of the case leading to the same conclusion. The court below, in its order of May 6, 1905, which was reversed by this court, did

not reverse any of the findings of fact of the trial court. It differed with that court, so far as the record speaks only on the law as to what constitutes an election between inconsistent remedies. This is an important distinction under the case cited by this court in the quotation above made from the opinion by Mr. Justice Holmes. Under these cases, the facts as found "constitute a sufficient statement of the facts of the case for the purpose of an appeal to this court."

Stringfellow v. *Cain*, 99 U. S., 614.

While this court will not review the facts in such a case, every question of law presented by the record in the court below was before this court, and your decree became final on every question so presented. This is the result of the decisions in *Tyler* v. *Magwire*, 17 Wall., 263, 283; *Stewart* v. *Salamon*, 97 U. S., 361; *Sibbald* v. *U. S.*, 12 Pet. (U. S.), 488, 492.

See, also: *Matthews* v. *Columbia Bank*, 100 Fed., 393; *Supervisors* v. *Kennicott*, 94 U. S., 498; *Illinois* v. *Ill. Cent. R. R. Co.*, 184 U. S., 77, 91.

If there had been other questions in the record which, in the opinion of this court, would have required a judgment against the appellant, so that the mistake of the Supreme Court on the question of election could not have been of any avail to it, the court would have affirmed the judgment of the Supreme Court. If even this court is limited upon the second appeal to the questions arising subsequent to the issue of its mandate as held in these cases, it is evident that there could be no jurisdiction in the Supreme Court of the territory to re-examine the

same record originally before it for the purpose of determining questions which it was erroneously held were yet open. (Rec., 83 *et seq.*) If all questions embraced in the original findings of fact and conclusions of law were settled by this court's action, nothing remained for the lower court to do but to set aside its decree of May 6, 1905, and remand the cause to the trial court with directions to proceed in accord with the original judgment. This was an act of such a character that Mr. Justice Ballou's earlier connection therewith could not destroy the act, as the court consisted of three members; the territorial court was only obeying this court's mandate.

The court finally reached the same result, *i. e.*, obedience to this court's mandate, by exercising a jurisdiction it did not possess and assuming to pass on questions already foreclosed to it. It, however, decided these questions in favor of the appellee, which was therefore not damaged by the court's mistake, except as to the expense incurred in this unnecessary litigation and this improper appeal, for which, it is submitted, appellee should be awarded damages under Rule 23 of this court.

Moreover, the appeal should be dismissed in accordance with the rule declared by this court in *Stewart* v. *Salamon*, 97 U. S., 361, Mr. Chief Justice WAITE speaking for the court:

> "An appeal will not be entertained by this court from a decree entered in the Circuit or other inferior court in exact accordance with our mandate upon a previous appeal. Such a decree, when entered, is in effect our decree, and the appeal would be from ourselves to our-

selves. If such an appeal is taken, however, we will, upon the application of the appellee, examine the decree entered, and if it conforms to the mandate, dismiss the case with costs."

We submit that Mr. Justice Ballou's participation in acts in which the court was without jurisdiction, cannot be made the ground of error or argument here. It is unnecessary to discuss this question, however, as counsel have abandoned the assignments of error covering the same by failing to urge them in argument; the decision in *Notley* v. *Brown*, 17 Haw., 393, seems conclusive and doubtless convinced counsel. We submit that the court below was without jurisdiction to further consider the exceptions, and that the appeal is therefore improperly here and should be dismissed, as this court is likewise without jurisdiction in the premises.

II.

In our argument upon the motion to dismiss this appeal we have sought to establish the proposition that the findings of fact made by the trial court must be treated as the ultimate findings of the Supreme Court of the territory, and as said in the Stringfellow case, "a sufficient statement of the facts of the case for the purposes of an appeal to this court," and that consequently there was no jurisdiction in the court below and is no jurisdiction in this court further to consider the cause.

In support of our motion to affirm in case the court holds it has jurisdiction and upon the merits of the case, we submit the following:

The counsel for the appellant frankly acknowledge (Appellant's Brief, 31) that they now seek to argue the case here upon the facts "upon which we argued the case on the former appeal." It is claimed that this right should be accorded them because the order of reversal in the Supreme Court of the territory was modified by the request of appellee's counsel in the trial court. (Appellant's Brief, 31.) If we turn to the record (Rec., 71, 72, 73) we find that the claim made is wholly without foundation in fact. All that the attorney for the present appellee stated in his affidavit was that, "it will have no further evidence to present at a second trial of said cause." (Rec. 72.) The motion based upon this affidavit asked that the judgment be entered for the defendant with costs. (Rec., 71.) The counsel for the appellant here did not advise the court that they wished to adduce any further evidence, or that they objected to this disposition of the cause, or that they in any way wished the findings of fact to be changed or amended. We submit that there is nothing in this situation to justify counsel's contention that they have been foreclosed from an earlier argument of the facts. On the contrary, the record in No. 212, October term, 1906, shows that all the evidence in this record and much more was therein, and as counsel state they made a full argument upon the facts and the findings of the trial court in that cause, counsel, by failing to advise the court that it was their wish to change the statement of facts upon which the court was proceeding by further evidence, must be held to have consented that the finding of facts should stand as the ultimate find-

ing for all purposes. The Supreme Court of Hawaii so understood counsel's attitude and hence held in the present case (Rec., 91) as follows:

> "The Supreme Court of the United States likewise said: 'The findings of fact were taken to be true by the Supreme Court and are not open to dispute except so far as they depend upon rulings of law,' which we construe as meaning, 'are not open to dispute in any event' and not as now contended by the defendant, 'are not open to dispute for that reason.'"

The Supreme Court also held (Rec., 90):

> "We are of the opinion that the findings are supported by undisputed evidence in so far as they are findings of material facts and not statements of legal conclusions or immaterial statements varying or contradicting written instruments, and that upon these facts the decision of the Supreme Court is conclusive against the defendant's contention."

This appears to dispose of the first point argued (Appellant's Brief, 24). It follows likewise that there is no necessity to follow counsel in their argument of the second proposition (Appellant's Brief, 32) upon the question of waiver. That question was fully argued at the former hearing as counsel concede, and findings against counsel's contention were on the present appeal held by the court below to be supported by undisputed evidence. (Rec., 90.) To ask this court again to consider the question, is both to ask it to change the law of the case, and to consider and weigh the evidence, neither of which can be done. This is equally true of the contention that the bringing of the mechanics' lien suit constituted a waiver. Appellant's Brief, 32 *et seq.*) That ques-

tion was fully argued on the former hearing and decided adversely to counsel's contention by this court. We therefore do not feel at liberty to follow counsel in their attempt to re-argue the question under the guise of a second appeal. This remark covers all the remaining questions urged in argument.

It is to be noted that counsel do not urge in argument the disqualification of Mr. Justice Ballou, or the vested right of the appellant in the opinion of the court as expressed on January 28, 1905, resulting, as was claimed in the assignments of error, in making void, so far as this case is concerned, the act of March 3, 1905, under which the former appeal reached this court. As counsel have abandoned these assignments (Rec., 110-111, Assignments 4), we leave them without further comment than we have given them in our argument in support of our motion to dismiss this appeal for want of jurisdiction.

We submit that the decree of the court below should be affirmed with 10 per cent. damages.

Respectfully submitted.

CHARLES H. ALDRICH,
HENRY S. MCAULEY,
HENRY W. PROUTY,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 447.

CLINTON J. HUTCHINS, TRUSTEE, APPELLANT,

vs.

WILLIAM W. BIERCE, LIMITED, A CORPORATION.

BRIEF AND ARGUMENT ON BEHALF OF CLINTON J. HUTCHINS, TRUSTEE, APPELLANT.

DAVID L. WITHINGTON,
W. R. CASTLE,
ALDIS B. BROWNE,
ALEX. BRITTON,
J. W. CATHCART,
Attorneys for Appellant.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 447.

CLINTON J. HUTCHINS, TRUSTEE, APPELLANT,

vs.

WILLIAM W. BIERCE, LIMITED, A CORPORATION.

Brief and Argument on Behalf of Clinton J. Hutchins, Trustee, Appellant.

STATEMENT OF THE CASE.

This is an action of replevin, begun July 20, 1903, in the Circuit Court of the First Circuit, Territory of Hawaii, the complainant asking for the recovery, by the appellee, a Louisiana corporation, having its principal place of business in Chicago, in the State of Illinois, from the defendant, a resident and citizen of Honolulu, Island of Oahu, in the Territory of Hawaii, of certain rails, engines, cars, and other equipment specified in detail, which were furnished by the plaintiff to the Kona Sugar Company, Limited, for its plantation in the District of Kona, on the Island of Hawaii, alleged to have been delivered and which passed into the possession of the Kona Company, but the title to which was reserved until the payment of a note of the Kona Company, for $37,044.53, payable six months after date, and secured

by first mortgage bonds of like amount, the delivery having been made and the note dated March 13, 1901, the transaction being in settlement of a previous contract, dated February 21, 1900, for the sale of the goods, title to be passed upon payment of a draft, which the Kona Company had failed to pay; that although the note was not paid, the property at all times continued in the possession and control of the Kona Company, up to the first day of June, 1903; that about the first day of April, by an order of the Circuit Court of the Third Circuit, in an equity suit, a receiver was ordered to sell the property of the Kona Sugar Company, Limited, aforesaid; that on the ninth day of May, 1903, he did sell; that at the sale the defendant became the purchaser and took possession of the property sued for; that demand was made for the property, and the actual value is alleged to be fifteen thousand dollars (Tr., pp. 29, 33, 34). The same allegation of value appears in the affidavit in replevin (Tr., 37, 38), and a bond in the sum of thirty thousand dollars was given, based on this allegation and affidavit (Tr., pp. 36, 37). The defendant obtained redelivery of the property on a return bond, reciting the value as $15,000. At the trial the complaint was amended by setting out the second and conditional contract of March 13, 1903, to be supplemental to the agreement of February 21, 1900; that by the former the latter was adjusted and settled by a contract in writing, and by increasing the allegation of the actual value of the property to twenty thousand dollars, further increased at the conclusion of the trial to twenty-two thousand dollars. Each of these amendments was made under the objection and exception of the defendant (Tr., pp. 1, 2, 19, 20).

At the trial the only evidence of value was given by W. W. Bierce, the president of the plaintiff, but the defendant recalled as a witness M. F. Scott, previously called by the plaintiff, and whom, it appeared, had been the receiver of the Kona Company, was familiar with the property, having laid a portion of the railroad, and operated the plantation and the

railroad for some time, to prove the deterioration of the railway material. Objection was made to the witness on the ground that he was not qualified as an expert to prove the condition or value by showing its condition. It was admitted that he was not called to prove the value but to prove its condition—to show deterioration—his evidence was excluded, the court not allowing him to testify as to the condition of the material of the railroad, including the rolling stock and rails, or whether the material appeared more worn or the engines worked less well than on the day possession was taken (Tr., pp. 13, 14)—in fact shutting out all evidence of deterioration or of present condition bearing on deterioration, and simply allowing the witness to testify to a physical injury as distinguished from destruction from wear and tear.

The Circuit Court rendered its decision and judgment, on March 19, 1904, for a return of the property, describing it in detail, as described in the complaint, as follows:

362 tons of steel T rails, weighing 35 pounds to the yard;

Joints for laying 550 tons of steel T rails;

Railroad track spikes to lay 550 tons of said rails;

10 sets 35-pound split switch material, complete;

16 railway cars 25 feet long, 7 feet wide, for 3-foot-gauge track;

One 9 x 14 class "A" saddle tank locomotive;

One 10 x 16 back saddle tank locomotive;

One Howe narrow-gauge track scale, capacity 25 tons;

One set rerailers;

Four track gaugers, 3 feet;

One rail-bender;

One track drill;

One section car with seats;

Two jacks;

or, in default thereof, recovery of the value, in the sum of twenty-two thousand dollars ($22,000), and for damages for detention, in the sum of one thousand and forty-five dollars ($1,045) and costs.

At the same time, at plaintiff's request, the court made certain findings of fact and conclusions of law. The plaintiff objected and excepted to the decision and judgment as contrary to the law and the evidence, and against the weight of the evidence, and upon the further ground (Tr., pp. 23, 26) that the decision and judgment should show the separate value of the different articles sued for and made the basis of the claim. The objections were overruled and exceptions duly taken. Objections and exceptions were also taken to each finding and conclusion of law. It was upon the objection to Finding 15, in regard to the value of twenty-two thousand dollars, that the amendment from twenty thousand dollars to twenty-two thousand dollars was made (Tr., p. 19), and this finding was objected to specifically on the ground that it did not set out the separate value of the property. Motion for new trial was made and overruled. Bill of Exceptions duly allowed, and the case went to the Supreme Court of Hawaii, where the court, in an opinion filed January 28, 1905, sustained the exceptions and reversed the judgment of the trial court on the question of election alone, and remanded the case to that court for further proceedings. A petition for rehearing was filed—and denied April 29, 1905—in which it was stated that in the opinion of the majority of the court the sale was absolute, but the petition was denied on the ground of an election. On May 6, 1905, on motion of the plaintiff, in order that he might appeal at once to this court, the former order was modified by directing the case to be remanded to the Circuit Court with instructions to enter judgment for the defendant, and on that day such a judgment was rendered—"that the exceptions, in so far as they raise the question of election, are sustained, and the said cause is hereby remanded to said Circuit Court, with direction to enter judgment for the defendant with costs." The plaintiff appealed to this court, which rendered its decision April 8, 1907 (205 U. S., 340), Mr. Justice Holmes delivering the opinion, in which, after

reciting that the Supreme Court of Hawaii had sustained the exceptions upon one point which went to the root of plaintiff's cause of action, and that it was upon plaintiff's motion that judgment had been ordered, it was held that the findings of fact were taken to be true by the Supreme Court, except so far as they depended upon rulings of law, and therefore that the case should not be sent back for a new statement of facts by the Supreme Court of Hawaii although one should have been made; holding that the contract was conditional; that there was no election because election involved an overt act between two inconsistent rights; that no election was possible in this case because there was but one right, the plaintiff having no legal right to enforce the lien which he sought to enforce; that in the present case the election was to transfer it to another; that the transfer could not be made unless the other assented; that the question whether the appellant's conduct purported to convey the property was not before the court, as the case stood on election alone, and the appellant had no right to elect in the sense of the argument; that, so far as election was concerned, the effect attributed to the assertion of the lien is that of a unilateral act—not an offer to which an assent might be presumed—which effect the appellant could not alone give. The opinion concludes by suggesting that some other subordinate suggestions were made, but that the only questions which were open were disposed of, reverses the judgment, and sends the case back to the Supreme Court of Hawaii for further proceedings in conformity with the opinion.

The defendant in his argument on the former appeal based his case not upon election but that the condition had been waived; that by this waiver the title had passed; that in fact the plaintiff was estopped both by the record and by acts *in pais*, and, further, that there was another action pending, it appearing that plaintiff had brought a petition in the receivership proceedings for the same property, which was

pending, and in which he took depositions subsequent to the bringing of this action.

Upon return of the case to the Supreme Court of Hawaii the plaintiff moved, on August 16, 1907, that a final order be made, without further argument, overruling the exceptions. When this came before the Supreme Court of Hawaii the defendant suggested the disqualification of Mr. Justice Ballou in the cause, for the reason that he was a member of the firm of Kinney, Ballou & McClanahan, attorneys-at-law for the plaintiff in the original transaction and attorneys-in-fact, having charge of their interests in the island; that the justice drew the instrument under which the plaintiff claimed title, and that he was also attorney for W. W. Bierce and Company and argued the case of McChesney *v.* Kona Sugar Company in an appeal from the confirmation of the order of the sale. On September 10, 1907, the Supreme Court of Hawaii rendered its decision and opinion, denying the motion for a final order on the ground that that court had only passed upon the questions of election and conditional sale, and had hitherto found it unnecessary to pass upon other points, overruled the objection of qualification of Mr. Justice Ballou (Tr., pp. 80-84) and set aside its judgment of May 6, 1905. The case was then argued on the remaining exceptions before the Supreme Court of Hawaii on November 11, 1907, but before the decision of the cause the plaintiff filed a petition for mandamus or certiorari to the Supreme Court of Hawaii in this court, which is still pending. On the 20th December, 1907, counsel for the defendant objected, before it was rendered, to the rendition of any opinion on the ground that it was inappropriate to take any further proceedings until the United States Supreme Court had disposed of the application for mandamus then pending; that the Supreme Court of Hawaii should withhold further proceedings until the United States Supreme Court disposed of the application. But the Supreme Court of Hawaii, saying that it did not see anything in the petition for mandamus which led it to think

the United States Supreme Court would take jurisdiction, ruled that it would announce its decision, which it did, overruling the exceptions (Tr., p. 125). It would appear that no alternative writ had been issued or served and no notice given (Tr., 125, 126).

The opinion rendered by Chief Justice Hartwell, after reciting the progress of the litigation, and expressing the opinion that the decision of this court in holding that the act of April 7, 1874, applied to appeals from Hawaii, under the act of March 3, 1905, gives rise to many confusing questions, as the act purports to deal with appeals from territories which have adopted the code system, while the courts of Hawaii observe the distinction between common law and chancery, then proceeds to hold "that the findings are supported by undisputed evidence in so far as they are findings of material facts and not statements of legal conclusions or immaterial statements varying or contradicting the written instruments, and that upon these facts the decision of the Supreme Court is conclusive against the defendant's contention." And after remarking that the "construction of the written instrument of March 13, 1901, is plainly a question of law," adds "What it was intended to be by the parties is as plainly immaterial," and that "the two contracts between the plaintiff and the Kona Sugar Company, as well as all the material acts of the plaintiff which are relied upon as constituting election, waiver or estoppel, are matters of documentary evidence, and it was for this reason that this court said: 'Upon the question of election in this case the material facts are undisputed and the construction of the contracts, which are in writing, is a matter of law for the court' (16 Haw., 426). The Supreme Court of the United States likewise said: 'The findings of fact were taken to be true by the Supreme Court and are not open to dispute except so far as they depend upon rulings of law,' which we construe as meaning, 'are not open to dispute in any event,' and not, as now contended by the defendant, 'are not open to dispute for that reason.'" While at the former

hearing it appeared to them that the contract of March 13, 1901, was supplementary to that of February 21, 1900, and that the retention of title was for further security by way of mortgage, this court having declared that this contract "took the place of that previously made," the Hawaiian court was not now at liberty to construe the second contract as merely changing some of the terms of the earlier contract, and not as a complete "substitution and effacement of that contract."

The court then, coming to the questions raised in the case, say:

"As to the claim of waiver, the passing of the title being subject to a condition precedent, the subsequent election of the plaintiff to treat the title as having passed and its waiver of the condition precedent are but two aspects of the same question. The matter of waiver was fully discussed in connection with the question of election in the defendant's brief in the Supreme Court as appears by that brief now filed with us and by its summary in the official report. Although the decision of the Supreme Court does not use the term 'waiver,' it sufficiently appears throughout that waiver of the condition precedent is the matter under discussion, as, for example, when the opinion says 'the election supposed and relied upon is an election to keep the contract in force but to leave out the reservation of title' (205 U. S., 347). If the plaintiff's acts, relied on by the defendant, would amount to a waiver under any circumstances, the decision of the Supreme Court proceeds upon the broad ground that the title to goods sold subject to a condition precedent cannot be passed by any unilateral act of the vendor" (Tr., 91-92).

Upon the question of estoppel, after expressing a doubt as to whether it was fairly included in the reasoning of the decision of the Supreme Court, it is said that the defendant could not have relied upon the prior representation that the property belonged to the Kona Company, since that had been receded from and a protest read at the sale, and that there was no estoppel by the judgments in 15 Haw., 710, and 16 Haw., 258, because the question of title was not then before the court.

The exception as to the refusal of the trial judge to find separate values for the articles furnished was denied because "the second contract does not mention the prices, and their separate values with reference to that contract are immaterial."

The exceptions to the amendment to the complaint were overruled on the ground that it did not appear that the defendant's rights were affected, the property having been returned to the defendant upon a statutory bond, and the exception to the exclusion of Scott's testimony was overruled because of the admission by defendant that he was not attempting to prove value.

A rehearing was applied for on the grounds:

(1) The pending petition for mandamus, of which the court and counsel had notice, it being uncertain whether the Supreme Court had reassumed jurisdiction of the cause, and particularly that it placed the defendant and his attorneys in the embarrassing position of appearing to take proceedings voluntarily in the Hawaiian court pending proceedings in the Supreme Court of the United States, including the petition for rehearing.

(2) That the court had overlooked the fact that the adjudication of January 28, 1905, ordering a new trial, was a final and conclusive adjudication at the time it was rendered, and the law of the case.

(3) That the court had overlooked the declaration in that opinion that the original contract set forth the various items and prices, and that that opinion was the law of the case, being final and conclusive at the time it was rendered.

(4) Error in holding of the written instrument of March 13, 1905, that "what it was intended to be by the parties is as plainly immaterial," citing from the case of Lowrey *v.* Hawaii, 206 U. S., 206.

(5) Error in holding that the findings of the trial court are not open to dispute in any event, and not as contended by defendant; that they were not open to dispute for the reason

that they were adopted for the purpose of the case in the Supreme Court of Hawaii, a misconstruction of the opinion of the Supreme Court of the United States.

(6) Error in holding that election and waiver are but two aspects of the same question, the petition pointing out the distinction made by Mr. Justice Holmes that election is a choice between two inconsistent rights, either of which may be asserted at the will of the chooser alone, whereas waiver is the intentional relinquishment of a known right and not necessarily a choice between two, and, therefore, that the opinion of the Supreme Court does not apply to a waiver, particularly where assent to the waiver is shown or may be presumed, and that in this case both prior and subsequent assent is shown.

(7) The overlooking by the Hawaiian court of the fact that while the title to the goods "cannot be passed by any unilateral act of the vendor," the assent of the vendee in this case is shown by its acts and declarations.

(8) The overlooking of the estoppel by record, by the amended decree obtained by the plaintiff on the petition in intervention upon the sale of the property, a decree inconsistent with a claim of title.

(9) The overlooking of the point that there was a pending action.

(10) The overlooking of the point that whether the first contract was merged in the second or not, the first remained as evidence to fix the value of the articles.

(11) Misunderstanding as to the testimony of the witness Scott, the court having failed to observe that counsel in admitting that he was not attempting to prove value was making a distinction between market price in exact figures and facts tending to show value, namely, the condition of the property and how much it had deterioriated.

(12) That the court had entirely overlooked the fact that the defendant, C. J. Hutchins, was the successor to and had all the rights of the bondholders and receiver, and that the estoppel claimed was on evidence.

This petition was denied, without argument, February 10, 1908, and decision entered overruling the exceptions March 4, 1908.

The Supreme Court of Hawaii has made the following statement of facts:

STATEMENT OF FACTS.

(1) Plaintiff is a corporation organized and existing under the laws of the State of Louisiana.

(2) Defendant is a resident of Honolulu, Territory of Hawaii, and a citizen of said Territory of Hawaii.

(3) The Kona Sugar Co., Ltd., is a corporation organized and existing under the laws of the Territory of Hawaii.

(4) On February 22, 1900, plaintiff and Kona Sugar Co., Ltd., entered into the contract evidenced by the following proposal and acceptance:

"HONOLULU, HAWAIIAN ISLANDS,
"*February* 21, 1900.

"KONA SUGAR COMPANY, *Hawaiian Islands.*

"GENTLEMEN: For the sum of forty-six ($46.40) dollars and forty cents per ton of 2,240 pounds, we propose to furnish you with five hundred and fifty (550) tons of first quality steel 'T' rails, weighing 35 lbs. to the yard. Also, to furnish sufficient complete joints to lay said rails for the sum total of two thousand two hundred and eighty-one ($2,281.00) dollars, one complete joint being furnished for each rail; a complete joint consisting of two angle bars and four bolts. Also, for the sum of one thousand four hundred and forty ($1,440.00) dollars to furnish sufficient 4½″ x ½″ railroad track spikes to lay the 550 tons of rails with cross ties 2′ between centers.

"The above prices are all freight prepaid to Honolulu, the Kona Sugar Company to reimburse Bierce for the insurance to be paid thereon.

"We are also to furnish for the sum of five hundred and forty-five ($545.00) dollars c. i. f. prepaid to Honolulu, ten sets of 35 pound split switch material complete with plantation target stand, No. 6 frog, 7′ 6″ split switch points, tie rods and slide plates; all designed for 3′ gauge of track.

"Further, to furnish sixteen (16) cars, 28′ long, 7′ wide, end stakes 5′ high above floor line, for 3′ gauge of track as per the following specifications; price to be three hundred and forty ($340.00) dollars per car c. i. f. prepaid to Honolulu."

(Here follow specifications for lumber, construction, trucks, stake pockets, ends, draw gear, brake, locomotives, and general specifications, with prices and terms of shipment.)

Terms of Payment.

Cash upon presentation of demand draft attached to bill of lading, issued by initial line of railroad, showing material to have been shipped through to Honolulu. Insurance policy shall be transmitted as soon as possible after shipment is made, when it shall be determined just what vessel shall haul the material from port on mainland to Honolulu.

All monies are payable in New York or Chicago funds; the Kona Sugar Company to pay all items of exchange.

Twenty-five hundred ($2500.00) dollars in paid-up stock of the Kona Sugar Company shall be the first payment on account of the purchases herein proposed; this $2,500.00 to be covered by 5% deductions from the materials as shipped. Bierce agrees to deposit this $2,500.00 stock of the Kona Sugar Company with the Banking House of Bishop & Company in the City of Honolulu, as guarantee for the final consummation of the contract.

NOTE.—Where reference herein is made to Honolulu as point of delivery—if vessels are available about time material is ready to ship sellers will make delivery at Kailua, District of Kona, in the Hawaiian Islands; but this is not to be construed as in any manner obligatory or binding.

This proposition is a confirmation of the verbal one made to the Directors of the Kona Sugar Company at their meeting Saturday, February 17th, 1900, and becomes binding on all parties when accepted by their agents, M. W. McChesney & Sons.

When duly accepted and made binding said contract is

amenable to the laws of the Hawaiian Islands in effect at date of signing.

Yours very truly,

(Signed) WILLIAM W. BIERCE, LTD.,
By FRANK DAVIES.

Accepted in duplicate by

THE KONA SUGAR CO., LTD.,
By M. W. McCHESNEY & SONS, *Agents.*

This 22nd day of February, 1900.

Truss rods on cars 4 in number, 1" dia. upset ends 1⅛" turnbuckles 1"".

W. W. BIERCE, LTD.,
By FRANK DAVIES."

(5) The property specified in the foregoing contract, hereinafter called the property in question, was shipped by plaintiff to Honolulu, but the drafts not being paid on presentation was not then delivered to the Kona Sugar Co.

(6) Plaintiff sent to Honolulu one H. T. Gilbert, its agent, to collect the price of the property in question and effect a settlement, and the following correspondence took place between plaintiff and Kona Sugar Co.:

HONOLULU, H. I., *March* 13, 1901.

KONA SUGAR COMPANY, LIMITED, *Honolulu, H. I.*

GENTLEMEN: In pursuance of the verbal arrangement made between your President and William W. Bierce, Limited, we hereby offer the following terms in settlement of the contract between the Kona Sugar Company, Limited, and William W. Bierce, Limited, as evidenced by letter dated Feb. 21, 1900, and accepted by the Kona Sugar Company, Limited, Feb. 22, 1900:

We will take in settlement of this contract the sum of $10,000, U. S. gold coin, and the promissory note of the Kona Sugar Company, Limited, for the sum of $37,044.53, in favor of William W. Bierce, Limited, payable six months after date at the Whitney National Bank in New Orleans, bearing interest at the rate of seven and one-half per cent. (7½%) per annum and secured by First Mortgage Bonds of the Kona Sugar Company, Limited, of par value equal to the

note, said bonds being portion of a duly authorized issue not exceeding $200,000. This offer is conditioned upon its acceptance by your payment of the money and the delivery of the note, with collateral, before 4 p. m. on Thursday, March 14th, A. D. 1901.

Upon such payment being made to us before the hour named, we will deliver to you the bills of sale authorizing you to take charge of the rails, locomotives, cars, scales and other materials now awaiting delivery, upon the express condition and understanding that said rails, locomotives, cars, scales and other materials are and shall remain the property of William W. Bierce, Limited, until the full payment of the note above described, according to its terms.

Very truly yours,

(Signed) W. W. BIERCE, LTD.,
By H. T. GILBERT.

The above terms are accepted this March 13th, 1901.

THE KONA SUGAR CO., LTD.,
By its President, J. M. McCHESNEY,
By its Treasurer, F. W. McCHESNEY.

Received on account of above agreement exchange on New York for ten thousand dollars and seventy-six (76) $500-Bonds of the Kona Sugar Co.—numbered from 1 to 76 both inclusive.

(Signed) W. W. BIERCE, LTD.,
By H. T. GILBERT.

(7) On March 13, 1901, Kona Sugar Co. paid the $10,000 and delivered the bonds specified in the above receipt and executed and delivered its promissory note reading as follows:

$37,044.53. HONOLULU, H. I., *March* 13, 1901

Six months after date we promise to pay to the order of Wm. W. Bierce, Limited, at the Whitney National Bank of New Orleans, La., U. S. A., the sum of thirty-seven Thousand and forty-four dollars and 53/100 ($37,044.53) with interest at the rate of seven and one-half per cent. per annum until paid, both principal and interest payable in gold coin of the United States.

Secured by bonds of the Kona Sugar Co. of the nominal value of thirty-eight thousand dollars $38,000 (seventy-six

bonds of the value of $500.00 each, numbered from 1 to 76, both numbers inclusive.)

(Signed) THE KONA SUGAR CO., LTD.,
By its President, J. M. McCHESNEY,
By its Treasurer, F. W. McCHESNEY.

(8) On March 13, 1901, upon the signing of the above acceptance and the delivery of the note, cash and bonds, plaintiff released the bills of lading from the drafts and the property in question was delivered to the Kona Sugar Co.

(9) The acceptance by the officers of the Kona Sugar Co. was ratified at a directors' meeting held March 16, 1901, the minutes of said meeting being as follows:

Minutes of Directors' Meeting Held March 16, 1901.

Present: J. M. McChesney, F. W. McChesney, W. W. Hall, W. L. Hopper, J. S. Walker & E. O. White.

Minutes of directors' meeting held Jan. 31/01 read and approved. A written offer from W. W. Bierce, Ltd., was read and discussed, after which the following resolution was read and on motion duly 2nd and unanimously approved.

HONOLULU, H. I., *March* 16, 1901.

Whereas, the Company is under contract with Messrs. Wm. W. Bierce Co., New Orleans, La., for railway material, amounting to about the sum of forty-seven thousand dollars with interest and charges to date, part of which material is now in Honolulu; and

Whereas, an offer was made by the said Wm. W. Bierce Co. through their authorized agent Harry T. Gilbert to accept in payment and security therefor ten thousand dollars in U. S. gold and bonds of the company to the amount of $38,000—taking the company's note for 6 mos. for balance due interest at 7½ per cent. per year—secured by the above mentioned bonds to the nominal value of thirty-eight thousand dollars, and the president agreed to such terms and made payment through the company's agents M. W. McChesney Sons to the said Wm. W. Bierce Co. the sum of ten thousand dollars, and did execute and delivered to them the company's note for $37,044.53 duly signed by the president and treasurer, payable in 6 months from this date with interest at 7½% per year till paid, secured by the company's bonds

of the nominal value of thirty-eight thousand dollars (which bonds were delivered to the said agent of Wm. W. Bierce Co. and receipt taken therefor).

Therefore, be it resolved that the settlement as made by the President Treas. the action of the president and treasurer in delivering the Company's bonds in the sum of thirty-eight thousand dollars as security in settlement therefor, be and the same is hereby approved and ratified by the directors of the company.

The following resolutions were then read & on motion duly 2nd were unanimously approved.

HONOLULU, H. I., *March* 16, 1901.

Whereas, an offer has been made by Messrs. Bishop & Co. to take bonds of the company lately authorized to the amount of fifty thousand dollars at 95,

Be it resolved, that the president and treasurer be and is hereby to sell and deliver bonds of the company of the amount of fifty thousand dollars at 95 net in accordance with the offer herein made, and apply the proceeds on account of sums due the agents Messrs. M. W. McChesney & Sons by the company for advances heretofore made.

Be it resolved further that the president and treasurer be and is hereby authorized without notice from the directors to sell and deliver any of the remaining portion of the Co.'s bonds at not less than 95., and apply the proceeds to the expenses of the Co. or to the liquidation of any of its debts.

HONOLULU, H. I., *March* 16, 1901.

Whereas the company is indebted to its agents, Messrs. M. W. McChesney & Sons, in the sum of one hundred thousand dollars ($100,000) on open acct., and further sums are required to carry on work of the plantation, which the agents promise to make provided the payment of the balance of the company's acct. is secured by bonds of the Co.'s lately authorized.

Be it resolved, That the company secure the payment to the agents of the balance of its acct. with them, and any further advances made by a mortgage or pledge of the Co.'s bonds of the nominal value of one hundred thousand dollars, and the president and treasurer are hereby authorized to execute such mortgage in the name and on behalf of the company.

The claim of Mr. Wilgeroth for money due on account of machinery was next brought up and action deferred till such time as the mill was running to its full capacity and said machinery could be tested.

It was moved that the Co. take the offer of Mrs. Greenwell to accept $1,000.00 for her claim to lower portion of land now claimed by the Co. Puapuaiki, which land she claims a ½ interest in. 2nd and carried unanimously. Meeting then adjourned.

E. O. WHITE,
Sec. Kona Sugar Co., L'd.

(10) The property in question, with the exception of a small portion thereof, was then used by the Kona Sugar Co. in the construction of a plantation railroad seven and one-half miles long, of which a little more than six miles was made of the rails from the plaintiff. The company owned the roadway for about one-third of a mile and an undivided interest for a little less than two-thirds of a mile, the rest of the roadway being held by the company partly under a license and partly by lease.

(11) The note of the Kona Sugar Co., Ltd., was not paid at maturity. The plaintiff's agent, Harry T. Gilbert, was sent to Honolulu in the latter part of December, 1901, for the purpose of collecting the money, but failed to do so.

(12) On the occasion of this visit said agent visited the Island of Hawaii and saw the railroad equipment in question being used and operated in constructing and running a plantation railroad of the Kona Sugar Co., Ltd., in connection with its sugar mill, and then saw the locomotives and cane cars in operation in the work of hauling cane to the mill. The plaintiff had other information from time to time that the property had been so used, and that the Kona Sugar Co. was operating this railroad on and as an essential part of its sugar plantation.

(13) On March 28, 1902, the company being without funds to carry on its business, harvest its crops, or pay the rents for its leaseholds, upon application of certain creditors, and by consent of the First American Savings & Trust Company, trustee under a deed of trust by the Kona Sugar Company conveying all its property as security for payment of its bonds, a receiver was appointed with authority to carry on the plantation in order to save the crop, who took possession

of the property of the Kona Sugar Company and of the railroad equipment.

(14) On May 14, 1902, the plaintiff filed in the circuit court of the third circuit, in which the receivership proceedings were pending, its "Notice of Lien of Materialman," declaring that it "has a lien on certain property of the Kona Sugar Company," described as "all that certain cutting, embankment, grading and filling, and track, switches, buildings, cars, engines and other property forming and constituting the line, roadway and equipment of the single track railroad of the Kona Sugar Company," for the sum of $37,044.53 and interest, for materials furnished by the plaintiff to the Kona Company for the construction and equipment of the said railroad, and August 1 the plaintiff, having obtained leave, brought a lien action against the receiver for recovery of the purchase money.

(15) As a result of conferences between the officers of the Kona Sugar Company and bondholders, stockholders and creditors, an agreement among the creditors was entered into May 15, 1902, and a bondholders' committee was appointed for the purpose of superintending the affairs of the corporation which were then in the hands of a receiver. The plaintiff, through its attorneys, participated in the conferences and was a party to the agreement. The committee's agreement was submitted to the court and received its approval, and under it for some time the receiver worked.

(16) On November 1, 1902, R. W. McChesney, J. M. McChesney, and F. W. McChesney, partners under the name of McChesney & Sons, filed a petition against the Kona Sugar Company and the First American Savings & Trust Company, wherein the petitioners prayed *inter alia* that all of the property of the said Kona Sugar Company at that time in the hands of a receiver should be sold subject to all liens of every kind and nature upon the said property at the date of the said receiver's appointment, and on November 5 a decree of sale was filed in said cause.

(17) On November 24, 1902, the plaintiff intervened in the receivership proceedings with its petition setting forth *inter alia* the indebtedness of the Kona Company for materials furnished to be used, and which in fact were used, in the construction and equipment of its railroad, that the plaintiff was the owner of $45,000 worth of the first mortgage bonds of the Kona Company secured by a mortgage

upon all its property, including the railroad equipment. The petition claimed that the decree of November 5 was not in conformity with the prayer of the petition in that it made no mention of the reservation of liens, and prayed that the order of sale be modified by excepting "all liens, rights, claims and interest of whatsoever name or nature of all bondholders and of all persons claiming, asserting or seeking to enforce any lien of whatsoever name or nature."

(18) On December 4, 1902, and again by continuance on December 15, 1902, the receiver attempted to sell all the property of the Kona Sugar Company subject to all liens of every kind and nature upon said property at the date of said receiver's appointment, but on neither occasion was there any bid. Upon return having been made of these proceedings the order of sale was vacated and the receiver authorized to enter into a contract for harvesting the growing crop of cane.

(19) On January 28, 1903, the plaintiff discontinued its lien action.

(20) On February 5, 1903, plaintiff applied for leave to bring an action of replevin against the receiver for the property in question, which was denied on the ground that no notice had been given to the other parties.

(21) The plaintiff then filed another petition in intervention dated February 12, 1903, alleging the proceedings in the receivership proceedings, the contract of February 21, 1900, the shipment of goods under it, the supplementary contract of March 13, 1901, the delivery of the property in question, the default on the note, and the insolvency of the Kona Sugar Company. The petition further alleged that title to the property in question was in the plaintiff, that on account of wear and tear and deterioriation it was not then worth to the plaintiff to exceed $10,000, and that possession had been demanded from the Kona Sugar Company and the receiver and had been refused. It prayed for the payment of the amount due upon the note or as an alternative the return of the property.

(22) On April 10, 1903, a motion of the plaintiff upon this petition in intervention for the appointment of a commissioner to take the depositions of Columbus Bierce and Harry T. Gilbert was allowed upon the stipulation of all parties interested. The depositions were subsequently taken on September 26, 1903, and by stipulation dated October 27, 1903, were used in the case at bar.

(23) On April 20, 1903, a decree was entered in the receivership proceedings ordering the sale on May 9, 1903, free and clear of all liens and encumbrances, of all of the property of the Kona Sugar Company for the purpose of paying the debts and liabilities incurred by the receiver, and, so far as might be in the order of their legal preferment, all liens, claims or demands against the company.

(24) On May 9, 1903, the property described in the decree and order of sale was sold at public auction and bought by the defendant, who was and had for some time been secretary of the Kona Sugar Co., for the sum of $12,250. The plaintiff gave notice at the sale of its claim of title, and the defendant bought with actual notice thereof.

(25) On May 20, 1903, the answer of the Kona Sugar Company to the petition in intervention dated February 12, 1903, was filed alleging that the so-called supplementary contract was executed without authority of the company which never agreed or consented to it, that during the year 1902 the intervener had waived all right or title to the property and all rights it might have had under the supplementary contract, and had brought its suit against the company in assumpsit for the amount due on the note, that at all times the supplementary contract had been treated and acted upon by the intervener and the Kona Sugar Company as void and of no effect, that the property was sold absolutely and outright and delivered to the company, and that the title has been and now is in the Kona Sugar Company. It was admitted that the note had not been paid and it was alleged that it was secured by bonds still held by the intervener

(26) On June 1, 1903, an order was entered confirming the receiver's sale of May 9, 1903.

(27) On June 5, 1903, the plaintiff, having protested against the order confirming the sale, appealed to this court from said order, its sole contention in this court being that the circuit judge had no jurisdiction either to appoint the receiver or to order the sale. The appeal was dismissed June 4, 1904. *McChesney v. Kona Sugar Co.*, 15 Haw., 710.

(28) On July 20, 1903, the plaintiff brought the present action of replevin against the defendant.

(29) On August 25, 1903, the plaintiff brought a writ of error to the order of sale of April 20, 1903, which was dismissed November 21, 1904, on the ground that it did not

appear that any of the property of the plaintiff was ordered to be sold. *Bierce v. McChesney*, 16 Haw., 258.

(30) On March 7, 1904, at the trial of the present cause, plaintiff was allowed to amend its complaint in the following particulars: (*a*) In par. 5 by striking out the words "a supplementary contract in writing was" and inserting in lieu thereof the words "said agreement of February 21, 1900, was adjusted and settled by a contract in writing," (*b*) by striking out the word "supplementary" in pars. 6 and 7 before the word "contract" and inserting after said word "of March 13, 1901," (*c*) by increasing the allegation of the actual value of the property from $15,000 to $20,000, (*d*) on March 19, 1904, by again increasing the allegation of the actual value of the property from $20,000 to $22,000.

(31) There was testimony to support the finding of the trial judge that the actual value of the property in question was $22,000 and that plaintiff had suffered damages from defendant's detention of the property in the sum of $1,045.

The court is of the opinion that several of the matters upon which the defendant has requested a statement of facts, including extracts from the pleadings in this case, bonds given upon attachment and redelivery of the property, and the suggestion of disqualification of Mr. Justice Ballou in this court, are matters sufficiently shown by the pleadings and papers in the cause, and are not required to be found in the statement of facts in the nature of a special verdict.

Honolulu, May 28 1908.

(Signed) ALFRED S. HARTWELL.
(Signed) A. A. WILDER.
(Signed) SIDNEY BALLOU.

ASSIGNMENTS OF ERROR.

The errors assigned, on which appellant relies, are:

5. That there was error in holding that upon these facts so found the decision of the Supreme Court of the United States rendered in this action is conclusive against the defendant's contention, and in refusing to consider other facts in the case appearing in the evidence, which facts are decisive in favor of the defendant's contention.

8. That the court erred in holding that the findings of the

trial court are not open to dispute in any event, and not, as contended, that they were not open to dispute in the Supreme Court of the United States, for the reason that they had been adopted for the purpose of the case by the Supreme Court of the Territory of Hawaii, and that this is a misconstruction of the opinion of the Supreme Court of the United States, since that court cannot go into the evidence but must take the ultimate facts found by the Supreme Court of the Territory of Hawaii, while the Supreme Court of Hawaii has the right to determine whether the evidence supports the findings.

9. That the court erred in overruling the exception of this defendant to the judgment as contrary to the law and the evidence and the weight of the evidence, on the ground that the court had no authority to render an alternative judgment or money judgment in an action of this character; and on the further ground that the judgment should show the separate value of the different articles sued for in order that the defendant might return any portion of said articles that he was able to return.

10. That the court erred in overruling the last-named exception of this defendant, on the further ground that the entry of the judgment was contrary to the law and the evidence and the weight of the evidence, since the evidence showed that there was another action pending for the same property, viz., an action in intervention to recover the value of the same out of the proceeds of sale.

11. That the court erred in overruling said last-named exception of this defendant to the entry of the judgment as contrary to the law and the evidence and the weight of the evidence, since the evidence showed that this respondent acquired his title at a receiver's sale ordered for the purpose of paying the expenses of a receivership, which receivership was carried on under the direction and for the benefit and at the request of the plaintiff, and, further, for the payment of mortgage bonds secured upon this property, with the knowl-

edge and concurrence of the plaintiff, as to the holders of which bonds the plaintiff was estopped to make any claim to the property or the proceeds.

12. That the court erred in overruling said last-named exception of this defendant to the entry of the judgment as contrary to the law and the evidence and the weight of the evidence, since the evidence showed that the plaintiff waived its right to retake said property or to make any claim thereto as against this defendant, the successor in interest to said receiver, his creditors and said bondholders, as well as said Kona Sugar Company, Limited.

13. That the court erred in overruling the exception of this defendant to the amendment made March 7, 1904, since that amendment changed the character of the action and increased the *ad damnum* from $15,000 to $20,000, materially changing the liability of this defendant and his rights and obligations under the bonds given in said action, and also materially changing the claim of the plaintiff subsequently to the property being retaken on a redelivery bond.

14. That the court erred in overruling the exception to the finding of the court below that the actual value of the articles sued for was at the time of bringing the action and at the time of judgment the sum of $22,000, on the ground that the said sum was in excess of the amount actually claimed by the plaintiff in the complaint and affidavit, and on the further ground that the finding did not set out the separate value of each different article comprising the property referred to in said finding; and further erred in connection with making said finding in amending the complaint increasing the amount claimed from $20,000 to $22,000 in order to conform with the proof over the objection and exception of this defendant.

15. That the court erred in overruling the exception of this defendant to the ruling of the court below in excluding the evidence of the witness M. F. Scott as to the condition of the railway material, and to the exclusion of the evidence of

said witness upon the difference in the appearance and condition of the rails and the engines and whether the engines worked less well now than on the day when defendant took possession; and also in striking out the evidence of said witness that, with certain exceptions, the material and equipment was in good working order at the time of the trial.

25. That the court erred in rendering its decision and judgment in favor of the plaintiff and against the defendant in error for that portion of the property sued for which was attached to the soil, on the ground that the same was a fixture and not the subject of an action of replevin, and on the further ground that the plaintiff is estopped to claim said property, the same having been affixed to the soil with its knowledge and consent (Tr., 110-113).

ARGUMENT.

I.

The fundamental error in the decision of the Supreme Court of Hawaii lies in holding that under the decision of the Supreme Court of the United States the findings of the Circuit Court are not open to dispute in any event.

This point is raised under the 5th, 8th, 11th, 12th, and 25th assignments of error, particularly under assignment 8.

When this cause was before the court on the former appeal we took the position that there being no statement of facts made by the Supreme Court of Hawaii the case should either be dismissed or sent back for a statement of facts, calling attention to the fact that in the three opinions in the record, and by the original judgment in the Supreme Court of January 28, 1905, the findings of fact were expressly reversed and set aside, but this court, holding that the Supreme Court of Hawaii having subsequently set aside that decision,

and at the plaintiff's request, rendered a judgment against it for the purpose of a speedy appeal to this court on May 6, 1905, upon those findings, on the ground that an election to treat the title as having passed was shown by them, said through Mr. Justice Holmes:

"This is an appeal from a decision upon a bill of exceptions in a case tried by the court of first instance without a jury. *Hecht v. Boughton*, 105 U. S., 235. The facts were found by the trial court and certain conclusions of law were stated, which the Supreme Court of the Territory held to be wrong. It sustained the exceptions upon one point which went to the root of the plaintiff's cause of action, and, upon the plaintiff's motion coupled with a statement that it would have no further evidence to present at a second trial, ordered a judgment for the defendant, in order that the case might be brought to this court. The findings of fact were taken to be true by the Supreme Court and are not open to dispute, except so far as they depend upon rulings of law, so that the questions for decision here are definite and plain, and there is no need to send the case back for a statement of facts by the Supreme Court, although one should have been made (*Stringfellow v. Cain*, 98 U. S., 610. *Harrison v. Perea*, 168 U. S., 311, 323)."

Bierce *v.* Hutchins, 205 U. S., 340, 343-344.

Three cases are cited; in the first, on the strength of which it is held that the act of April 7, 1874, applies to this Territory; which act, so far as is material here, is as follows:

"That the appellate jurisdiction of the Supreme Court of the United States over the judgments and decrees of said territorial courts in cases of trial by jury shall be exercised by writ of error, and in all other cases by appeal according to such rules and regulations as to form and modes of proceeding as the said Supreme Court have prescribed or may hereafter prescribe.

"*Provided*, That on appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below and transmitted to the Supreme

Court, together with the transcript of the proceedings and judgment or decree."

The court say:

"Upon a writ of error we are confined to the bill of exceptions, or questions of law otherwise presented by the record; and upon an appeal, to the statement of facts and rulings certified by the court below. The facts set forth in the statement which must come up with the appeal are conclusive on us."

Hecht *v.* Boughton, 105 U. S., 235, 236; 26 L. Ed., 1018.

In the second case cited the court say of this act:

"Under this Act, if the findings of the District Court are sustained by the Supreme Court, and a general judgment of affirmance rendered, the findings of the District Court, thus approved by the Supreme Court, will furnish a sufficient 'statement of the facts of the case' for the purpose of an appeal to this court. The same will be true if there is a reversal, for the reason that the facts as found are not sufficient to support the judgment. But if, as in this case, the judgment is reversed because the evidence does not sustain the findings, other findings must be made before the case can be put in a condition for hearing in this court on appeal."

Stringfellow *v.* Cain, 99 U. S., 610, 613-614; 25 L. Ed., 421.

In the last case cited this court cite numerous cases to the point, and say:

"Our further examination must proceed upon the finding of facts as made by the court below, for this being an appeal from the Supreme Court of a Territory those findings are conclusive upon this court. The jurisdiction of this court on such an appeal, apart from exceptions duly taken to rulings on the admission or rejection of evidence, is limited to determining whether the findings of fact support the judgment."

Harrison *v.* Perea, 168 U. S., 311, 323; 42 L. Ed., 478.

Now, as "it is well settled that the opinion cannot be resorted to to help the findings" (Saltonstall *v.* Birtwell, 150

U. S., 416), and as on an appeal from the Supreme Court of a Territory, "although all the evidence may be reported the Court cannot consider it" (Idaho & Oregon Land Improvement Co. *v.* Bradbury, 132 U. S., 509), not even though it be an agreed statement of facts, which brings nothing before the Supreme Court of the United States for consideration (U. S. Trust Co. of New Mexico, 183 U. S., 536); and as "it is fundamental that when the judgment of a court is challenged in error its rulings alone are open to consideration" (Montana R'y Co. *v.* Warren, 137 U. S., 348) it would seem to necessarily follow that the clear purport of the language used by Mr. Justice Holmes is that the only questions before the court were whether the acts found by the Circuit Court constituted, as a matter of law, an election of rights fatal to its case, and whether the facts found by the Circuit Court constituted, as a matter of law, a conditional sale; or, in other words, whether the facts found by the Circuit Court supported its judgment, for as has been said by this Court:

> "The necessary effect of this enactment is that no judgment or decree of the highest court of a territory can be reviewed by this court in matter of fact, but only in matter of law."
>
> Marshall *v.* Burtis, 172 U. S., 629.

Therefore, when this case was before this court on the prior appeal, as was held in the case of Montana Railway Co. *v.* Warren, *ubi supra*, the only thing which could be reviewed was the ruling of law made by the Supreme Court of Hawaii, which ruling was that even on the findings of the Circuit Court the defendant was entitled to judgment. It follows as a necessary conclusion that the defendant here did not have his day in court on the question whether those findings were supported by the undisputed facts or whether there were other undisputed facts which destroyed the effect of those specific findings. It must be remembered that Hawaii has not the code practice; that findings of fact may be either general or special, as in a case where the issues of fact are tried

by a jury, and that it is not error for a court to refuse to make any special findings, or any particular special finding, either of law or of fact (Waialua Agr. Co. *v.* O. R. & L. Co., 18 Hawaii, 81). The court had itself previously reversed the findings, and had entered the particular judgment appealed from only at the request of the plaintiff, and in order that plaintiff might have a final judgment which might be at once reviewed on a writ of error to the Supreme Court of the United States (Tr., 71, 73). Such seems to have been the view of the Supreme Court of Hawaii upon the motion for entry of judgment without argument (Tr., 83, 84). If, however, after having reversed the findings upon our appeal, and having adopted them for a special purpose at the request of the plaintiff (since the question of election in any state of the findings, according to the opinion of the Supreme Court of Hawaii, would have disposed of the case in favor of the defendant), in order that the plaintiff might take it presently to the Supreme Court (Tr., p. 71), it can now be said, as is said by the Supreme Court of Hawaii, that these findings are not open to dispute in any event, the defendant has never had his day in court to dispute those findings. In fact, all that the Supreme Court of Hawaii did originally was to hold that the findings of the Circuit Court did not justify its conclusion, without considering the question whether these findings were sustained by the undisputed facts, for these facts are undisputed, as the Supreme Court of Hawaii holds, in the very paragraph now under discussion, "all the material acts of the plaintiff which are relied upon as constituting election, waiver or estoppel, are matters of documentary evidence," the construction of which is "a matter of law for the court" (Tr., p. 91). But these documents and these undisputed facts are not contained in the findings of the Circuit Court. As stated by Mr. Justice Holmes, it is the conclusions of law of the trial court which were held to be erroneous by the Supreme Court of Hawaii, that being

enough to reverse the judgment, and it is that ruling of the Hawaiian Court alone which was passed on by this court.

This question has been settled in accordance with our contention in appeals from other courts, but the principles applied are equally persuasive. Thus, in a case where this court had reversed the judgment of the Court of Claims, which had refused to find a certain fact alleged by the petitioner, which he requested the Court to find, upon a petition for mandamus, this court said:

"Our mandate required the Court of Claims to proceed in the cause remanded in conformity to law and justice. We did not undertake to direct what law and justice did require, any further than to say that upon the finding of facts appearing in the record sent to us upon the appeal, the judgment was erroneous. In everything else the Court of Claims was left free to proceed with the cause in its own way and according to its own judicial discretion. That discretion we cannot control in this form of proceeding."

Ex parte Medway, 23 Wall., 504, 506-507.

So, in another case, where a special finding of the Circuit Court embracing only part of the issues was reversed by this Court, and the case remanded, with "instructions to proceed in conformity with the opinion," upon a motion for mandamus, this court said:

"The finding brought here for review was special, and met only a part of the issues. *If the conclusion of law to which the court came was correct, the other issues were immaterial. The case was disposed of without reaching them. We have, however, determined that the facts found were not sufficient to justify the conclusions reached; and have ordered the court to proceed with the case, notwithstanding the finding. In effect, we have decided that the court erred in not proceeding to try the other issues.* Our action only precludes that court from adjudging in favor of the defendants upon the special facts found and sent here for our opinion. In all other respects, it is at liberty to proceed in such manner as, according to its judgment, justice may require."

Ex parte French, 91 U. S., 423, 426.

Again, in a recent case, where it was held that a judgment of reversal upon a demurrer to defenses sustained in the lower court, where it was contended that the only question left open was that upon which the reversal was had, this Court, through Mr. Justice Brewer, said:

"Clearly the contention of the plaintiffs is not sustainable. When a case is presented to an appellate court it is not obliged to consider and decide all the questions then suggested or which may be supposed likely to arise in the further progress of the litigation. If it finds that in one respect an error has been committed so substantial as to require a reversal of the judgment, it may order a reversal without entering into any inquiry or determination of other questions. *While undoubtedly an affirmance of a judgment is to be considered an adjudication by the appellate court that none of the claims of error are well founded—even though all are not specifically referred to in the opinion—yet no such conclusion follows in case of a reversal. It is impossible to foretell what shape the second trial may take or what questions may then be presented. Hence the rule is that a judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided.* An actual decision of any question settles the law in respect thereto for future action in the case. Here, after one judgment on the pleadings had been set aside, on amended pleadings a trial was had, quite a volume of testimony presented, and a second judgment entered. That judgment is now before us for review, and all questions which appear upon the record and have not already been decided are open for consideration."

Mutual Life Insurance Co. v. Hill, 193 U. S., [redacted]; 553.

So, in another case, where it was held that the Circuit Court might, after a reversal, allow amendments and pleadings for the purpose of more clearly presenting the facts at issue between the parties, it was said:

"But the Circuit Court may consider and decide any matters left open by the mandate of this court, and its decision of such matters can be reviewed by a new appeal only."

And again:

"The case is quite different in this respect from those in which the whole case, or all but a subsidiary question of accounting, had been brought to and decided by this court upon the appeal."

Sanford Fork & Tool Co., petitioner, 160 U. S., 247, 256-259.

The defendant has been put in the anomalous position of securing a reversal of the findings of the Circuit Court in the Supreme Court of Hawaii, which order had been modified, without his concurrence, by his antagonist, in order that the question of election might be taken to this Court, and after that question has been decided against him, is met by the suggestion of the Supreme Court of Hawaii that the findings of the Circuit Court in the case are conclusive against him, not by virtue of its own decision but by the decision of this court, although it proceeds to find facts which completely destroy those findings.

We submit that the plain dictates of justice demand that the case should be here decided on the facts now found by the Supreme Court of Hawaii, and we make this submission with more confidence because these facts are the facts upon which we argued the case on the former appeal. But our contentions were not considered by this Court, obviously for the reason that they were not before the Court on the findings of the Circuit Court, which only raised two defenses—an election and an absolute sale.

II.

The facts found by the Supreme Court show as a matter of law that the condition reserving title has been waived by the plaintiff, and that that waiver was assented to by the Kona Sugar Company, Limited, and its receiver, and that such waiver is binding and conclusive between the parties to this action.

This point is raised under assignments of error 12 and 25.

Definition of election, waiver, estoppel by record, and estoppel in pais.

The defendant upon the former appeal did not argue the case upon the ground decided in his favor by the Supreme Court of Hawaii, namely, that of election, but upon the ground that "*if the sale was conditional, the condition was waived*," and while in terms our argument was not noticed by this court, in its opinion it is said:

"In the case at bar there is no pretense that the appellant's conduct purported to convey the property to the Kona Company in advance of the performance of the stipulated conditions. The case stands on election alone, and the appellant had no right to elect in the sense of the argument" (Tr., p. 78).

And the court, apparently *ex industria*, refers neither to waiver nor estoppel, with which our argument was replete. At the argument Mr. Justice Holmes repeatedly pressed counsel to state on what ground title, which required the concurrent assent of both parties, would pass in case of an election by the vendor, suggesting that the strongest ground was that assent by the vendee could be presumed, being beneficial to him. We did not answer this because at that time our examination of the authorities and the text writers showed no satisfactory discussion of the grounds on which election, waiver and estop-

pel, respectively, rest, nor have we found anywhere any adequate discussion of the distinctions between the terms. The best discussion is to be found in Bigelow on Estoppel, particularly in Chapters 21 and 26, 5th Ed. We shall, however, endeavor to give some interpretation to these terms, premising that they are sometimes used interchangeably, and acknowledging indebtedness to the former decision in this case for clarifying the definition of one of the three.

Election has been defined in this case as "a choice shown by an overt act between two inconsistent rights either of which may be asserted at the will of the chooser alone." It is, as expressed in the former opinion, "a strictly unilateral act, not an offer to which an assent might be presumed." It is a choice between inconsistent rights.

Waiver has been defined by Chief Justice ~~Swayne~~ Shaw in *Fowler v. Ellis*, 15 Gray, 229, as follows:

"When there is a condition made at the contract of sale favorable to the vendor, and solely for his benefit, he may, if he choose, waive it, and treat the contract as if no such condition had been embraced in it. Waiver is a voluntary relinquishment or renunciation of some right, a foregoing or giving up of some benefit or advantage, which, but for such waiver, he would have enjoyed. It may be proved by express declaration; or by acts and declarations manifesting an intent and purpose not to claim the supposed advantage; or by a course of acts and conduct, or by so neglecting and failing to act, as to induce a belief that it was his intention and purpose to waive."

An estoppel by a judicial record has been defined by Mr. Justice Swayne, in *Railroad Company v. McCarthy*, 96 U. S., 258, 267-268, as follows:

"Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after the litigation has begun, change his ground, and put his conduct upon another and different consideration. He is not permitted thus to mend his hold."

Having joined, to its expected advantage, with the creditors in the receivership proceeding, plaintiff cannot now claim the property sold for the expense of that receivership By virtue of this estoppel by record, in that having plead in their petition for intervention that this was the property of the Kona Sugar Company and was subject to the mortgage sought to be foreclosed, they cannot now "mend their hold." This is laid down in Coke on Littleton, Comyn's Digest, in Bouvier, cited in *Sullivan v. Colby* (71 Fed., 461, 464), and is sustained by many other cases, perhaps the nearest in facts being one where in a foreclosure proceeding it was held that a corporation which had sold property conditionally, and which had joined with other creditors in taking a joint mortgage covering this with other property, could not on the foreclosure claim the property under the conditional sale (*Hinchman v. Point Defiance Railway*, 14 Wash., 349; 44 Pac., 867).

An estoppel in pais has been defined by Mr. Justice Swayne, in *Dickerson v. Colgrove*, 100 U. S., 578, 580, as follows:

"The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood and the law abhors both."

"Where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things and induces him to act on that belief, so as to alter his previous condition, the former is concluded from averring against the latter a different state of things as existing at the same time."

Many cases may come under two or even more heads. It is not strange that the terms should be confused. But the result of these definitions is that an election is a choice by one party made between two inconsistent rights; waiver, the relinquishment of a known right, not involving

choice between two, but involving either the express or implied assent of the other party; while estoppel involves an element of fraud which is wanting in both election and waiver. It has been said that waiver cannot be regarded as a contract (Schwartz *v.* Wilmer, 90 Md., 136; 44 Atlantic Rep., 1059), yet it seems to us to partake of the nature of a new contract, although based upon an old contract, some of the terms of which are eliminated by the waiver of the party in whose favor the reservation is made, and the express or implied assent of the other party—not necessarily upon a new consideration, but based upon the original contract and the meeting of minds, by which a new contract, eliminating a previous provision, is made between the parties, based upon the original contract as in this case.

When, as is said in a Tennessee case (Trotlinger *v.* Rly., 79 Tenn., 553), waiver is predicated on a party being misled, we think it then comes under the head of estoppel, but intention and assent are, as is shown by the cases hereafter cited, to be drawn from overt acts, and are not controlled by an undisclosed intention.

In this case, on the findings, it has been held that there could be no election. Mr. Justice Holmes says (page 347):

"But the assertion of a lien by one who has title, so long as it is only an assertion and nothing more, is merely a mistake. It does not purport to be a choice, and it cannot be one because the party has no right to choose. The claim in the lien suit, as was said in a recent case, was not an election but an hypothesis. Northern Assurance Co. *v.* Grand View Building Assoc'n, 203 U. S., 106, 108. The fact that a party, through mistake, attempts to exercise a right to which he is not entitled does not prevent his afterwards exercising one which he had and still has unless barred by the previous attempt. *Snow v. Alley*, 156 Mass., 193, 195."

A choice between two rights is not necessary to a waiver. The difference is manifested by Mr. Justice Holmes in the former opinion, where he says (page 346):

"In all such cases the characteristic fact is that one party has a choice independent of the assent of any one else. But if a man owns property he has no election to transfer it to another. He cannot make the transfer unless the other assents. And equally, if he owns property subject to be divested by the performance of a condition, he has no election to divest it without performance. The other party must assent. Transfer is very different from election, and requires acts of a different import on the part of the owner, and corresponding acts on the part of the transferee."

It becomes necessary to determine whether there has been a waiver upon the facts now found by the Hawaiian Court.

Facts Found by the Supreme Court of Hawaii Which Show Waiver.

The railroad material was sold to the Kona Company and was used by it in the construction of the plantation railroad on land which they either owned, had an undivided interest in, or held under a license or lease (Finding 10, Tr., p. 105). After failure to pay the note when due, viz., in December, 1901, the plaintiff's agent visited the Island of Hawaii, saw the railroad equipment in question being used and operated (Finding 12, Tr., pp. 105, 106), and plaintiff allowed it so to remain and be used as an essential part of the Kona Company's plantation without making any adverse claim until February 5, 1903. At the time of the sale there were existing bonds of an issue not exceeding $200,000 (Finding 6, Tr., p. 102), of which the plaintiff received $38,000 as security for the purchase price of the material (Finding 7, Tr., p. 103), and $50,000 of which were authorized to be sold to Bishop & Company at the same meeting at which this contract was ratified and approved at 95 net, and the remainder authorized to be sold at said price to pay the expenses of the company or the liquidation of its debts; and at the same meeting $100,000 of further bonds were authorized to be issued and a mortgage to secure the same for an

existing indebtedness of one hundred thousand dollars to its agents (Finding 9, Tr., pp. 104, 105). The former bonds were secured by a deed of trust conveying all its property, as security, to the First American Savings & Trust Company (Finding 13, Tr., p. 106), including the railway equipment (Finding 17, Tr., pp. 106, 107).

The company being without funds to carry on its business or harvest its crops or pay its rents, upon the application of creditors, and with the consent of the trustee under the deed of trust, a receiver was appointed, with authority to carry on the plantation, who took possession of its property, including the railroad equipment (Finding 13, p. 106), and pending these proceedings plaintiff filed its mechanic's lien upon all the property, including the railroad equipment, and brought its lien action for the recovery of the purchase money (Finding 14, Tr., p. 106). With the officers, bondholders, stockholders and creditors of the company, it participated in and was a party to an agreement made by the creditors May 15, 1902, the day after it filed its lien, by which a committee was appointed to superintend the affairs of the corporation while in the hands of the receiver. This agreement was submitted to the court, received its approval, and under it for some time the receiver worked (Finding 15, Tr., p. 106). Six months after, on November 1, 1902, the same firm of McChesney & Son, who were owed, on March 6, 1901, one hundred thousand dollars, filed a petition in the cause and procured a decree for the sale of the property, subject to liens. The plaintiff formally intervened in the receivership proceedings, setting up that the Kona Company owed it for material "*furnished to be used, and which in fact was used*, in the construction and equipment of its railroad; that the plaintiff was the owner of $45,000 worth of the first-mortgage bonds of the Kona Company secured by a mortgage bond upon all its property, including the railroad equipment" (Findings 16, 17, Tr., pp. 106, 107). This petition appears either to have been granted by the court

or assented to, for on December 4 and December 15, 1902, the receiver attempted but failed to sell the property as prayed for (Finding 18, Tr., p. 107).

It was not until January 28, 1903, long after it had been found impossible to sell the property subject to liens, that the plaintiff discontinued its lien action (Finding 19, Tr., p. 107), and it was not until February 5, 1903, or perhaps February 12, 1903, when the petition was filed, that the plaintiff claimed ownership, or that there had been any conditional sale, and that possession was demanded from the Kona Company and refused. In this latter petition it is alleged that the machinery had been so deteriorated by wear and tear that it was not worth to plaintiff over $10,000 (Findings 19, 20, 21, Tr., p. 107).

In the ratification of the contract of March 13, 1901, by the directors of the Kona Sugar Company (Finding 9, Tr., p. 104) no reference is made to any reservation of title, and there is no finding showing that at any time any of the creditors or bondholders or any of the officers of the Kona Company knew anything about the claim or a reservation of title until February, 1903, two years after the contract was made, and after the receiver had, with the concurrence of the plaintiff, made repeated efforts to sell the title to this property; the claim of the Kona Sugar Company itself is found in its answer to the last petition in intervention, which is dated February 12, 1903, where it alleges that the plaintiff here had waived all right or title to the property, both parties having treated the condition as waived, and suit brought in assumpsit for the amount due (Finding 25, Tr., p. 108). This action was still pending, and depositions were taken in it long subsequent to the bringing of this action (Finding 22, Tr., p. 107). The plaintiff gave notice at the sale of its claim of title and the defendant bought with actual notice thereof (Finding 24, Tr., p. 107). The sale was made of all the property, free and clear of all liens and encumbrances, "for the purpose of paying the

debts and liabilities incurred by the receiver, and, so far as might be, in the order of their legal preferment, all liens, claims or demands against the company."

Hence while the former opinion suggests that the Kona Company originally "got its rights from the contract, and, of course got only such rights as the contract gave" (205 U. S., 348, 349), it is now plain that by the subsequent course of events and the voluntary action of the vendor the creditors and bondholders of the Kona Company, to whose rights the present purchaser succeeded, are justly entitled to claim the resulting waiver or estoppel which the vendor's action had created in their favor.

In other words, the facts found show that the material was sold to be used and incorporated as an essential part of the plantation; that it was allowed to be so used long after the right of recaption arose, and long after the property had gone into the hands of the court; that it was operated while in the hands of the court under the direction of a committee in the appointment of which the plaintiff took part and who represented it; that when it was sought to sell the title to this property, subject to mortgages and other liens, plaintiff joined in the request for the sale, and that in accordance with his request a sale was attempted twice; and that it was not until it was clear that he would realize nothing from his bonds or his mechanic's lien suit that he made any claim to the title of the property. It is also clear that if his claim prevails he will take property out of a receivership which he has permitted to go into the receivership, as an essential part, in order that it may be operated, without making any claim to its ownership, and assenting to its sale as against debts incurred in carrying on a receivership in the control of which he participated. It is also clear that he will divert the rights of his fellow bondholders whose rights have become fixed by the assertion of a right of which they had no notice and which plaintiff itself had denied to exist by its

own declaration that the property was subject to the lien of the mortgage.

The delivery of railroad material to be affixed and used as an essential part of the Kona Company's plantation, mortgaged as a whole, including the railroad equipment, to secure the bonds is a waiver.

And such is the rule in this court:

"Whatever is the rule applicable to locomotives and cars, and loose property susceptible of separate ownership and of separate liens, and to real estate not used for railroad purposes, as to their being unaffected by a prior mortgage given by a railroad company, covering after acquired property, it is well settled in the decisions of this court that rails and other articles which become affixed to and a part of a railroad covered by a prior mortgage will be held by the lien of such mortgage in favor of *bona fide* creditors, as against any contract between the furnisher of the property and the railroad company, containing stipulations like those in the contracts in the present case. *Dunham v. R. Co.*, 68 U. S., 1 Wall., 254 (17:584); *Galveston R. R. v. Cowdrey*, 78 U. S., 11 Wall., 459, 480, 482 (20:199, 206); *U. S. v. New Orleans R. R.*, 79 U. S., 12 Wall., 362, 366 (20:434, 436); *Dillon v. Barnard*, 88 U. S., 21 Wall., 430, 440 (22:673, 678); *Fordick v. Schall*, 99 U. S., 235, 251 (25:339, 342.)"

Porter v. Pittsburg Bessemer Steel Co., 122 U. S., 267.

This case was cited and applied in an action where it was sought to displace a former mortgage by a mechanic's lien, where Mr. Justice Brewer, in deciding these propositions, says that the record imparted notice of the terms of the mortgage and that this express lien could not be displaced by a contract with a third party.

Toledo Ry. Co. v. Hamilton, 134 U. S., 296.

In another case where the question was between the contractor to build a section of the road and the prior mortgagee the court held that the prior mortgage was a first lien

upon the rails and other fixtures; that all persons claiming in privity with the company were debarred from asserting that the mortgage did not cover all the property and rights which it professes to cover; citing *Galveston H. & H. R. Co. v. Cowdrey*, 78 U. S., 11 Wall., 459, the court continued:

"That by the common law whatever is affixed to the freehold becomes part of the realty, except certain fixtures erected by tenants, which do not affect the question; and that the rails put down upon the company's road become a part of the road. Here the same rule applies, and not only the rails but those permanent fixtures which are essential to the successful operation of the road, become a part of the property of the company, as much so as if they had existed when the mortgage was executed.

"The doctrine that a vendor not taking security for the price of realty sold by him holds in equity a lien upon the property for such price is not controverted, but it has no application to the present case. The only right which the complainants possessed was that which was recognized by the decree—a right to redeem the property from the sale under the mortgage—a right which they were allowed to exercise within a specific period; but, they declining to do so, the bill was properly dismissed."

Thompson v. White Water Valley R. R. Co., 132 U. S., 68.

In another case this court said that under a mortgage of a railway which assumed to convey and mortgage "the railroad which the company was authorized by law to build, together with its superstructure, appurtenances, fixtures and rolling stock, these several items of property, as they came into existence, would become instantly attached to and covered by the deed, and would have fed the estoppel created thereby. No other rational or equitable rule can be adopted for such cases."

Galveston H. & H. R. Co. v. Cowdrey, 11 Wall., 459.

These cases and others cited under the next head have been commented on favorably in a more recent case, which

collects the authorities holding that the track is a necessary and inseparable incident to the enjoyment of the right of way.

New Mexico v. U. S. Trust Co., 172 U. S., 171.

The strong inclination of the courts is to hold that a conditional sale is not binding upon creditors, purchasers or incumbrancers, deceived or likely to be deceived by the secrecy of the contract.

Collins v. Houston, 138 Pa., 431; 21 Atl., 234.

Loving Pub. Co. v. Johnson, 68 Tex., 273; 4 S. W., 532.

Ryder v. Cooley, 58 Conn., 367; 20 Atl., 470.

As was said in an Alabama case, any equitable act on the part of the vendor treating the property as the property of the vendee is a waiver and abandonment of the title reserved on the sale.

Hickman v. Richburg, 122 Ala., 638; 26 Southern, 136.

Oskamp v. Crites, 37 Neb., 837; 56 N. W., 394.

We also cite a line of cases where machinery, consisting of motive power, such as generators, for an electric railroad, is affixed thereto and an indispensable part of the railway, the court will not permit the title to be asserted on a conditional sale any more than in the case of the tracks of the railway itself.

Phœnix Iron Wks. v. N. Y. Security & Trust Co., 83 Fed., 757.

N. Y. Security & Trust Co. v. Capital Ry. Co., 77 Fed., 529.

Evans v. Kister, 92 Fed., 828.

In these cases the rights of mortgagees to after acquired property were declared, but a distinction drawn as to the rolling stock, a distinction which is not pertinent to this case,

as the mortgage contemplated the railroad with the rolling stock as a part of its security, and the vendor took a lien on this rolling stock as well as upon the realty, to secure the purchase price.

The Massachusetts cases fully support the proposition that where property, whether it be machinery, rails or similar property, is delivered to be attached and which is attached to a railroad, it becomes so inseparably incorporated that it cannot be removed for non-payment of the price, as against a *bona fide* purchaser or incumbrancer or mortgagee.

Hunt v. Bay State Iron Wks., 97 Mass., 279.

Hopewell Mill Co. v. Taunton Savings Bank, 150 Mass., 519; 23 N. E., 327.

Meagher v. Hays, 152 Mass., 228; 25 N. E., 105.

See also Jones on Railway Securities, section 105.

Whether the rolling stock and equipment of a railroad is real estate or personal property, and it has been well said that this court inclined to regard them as chattels real, it is well settled that the rolling stock as respects mortgages is inseparably connected with the roadbed and is a fixture.

Milwaukee & M. R. R. Co. v. James, 6 Wall., 750.

Pennock v. Col., 23 Howard, 117.

Galveston R. R. Co. v. Cowdrey, ubi supra.

Neither is this rule modified by cases like *United States v. New Orleans & Ohio R. R. Co.*, 12 Wall., 362; 20 L. Ed., 434, and *Fosdick v. Schall*, 99 U. S., 251; 25 L. Ed., 339, as to loose property susceptible to separate ownership, for in this case, unlike the vendor in those cases, the mortgage upon the same property was within the contemplation of the parties as a part of the transaction, nor is it like the case of *Bear Lake, etc., Co. v. Garland* (164 U. S., 1), where the property came into the hands of the mortgagor subject to the lien. The principle of the latter case is, as Mr. Justice Peckham says in the opinion "in entire harmony with the Galveston Railroad case."

We concede that where a railroad acquires loose property as for instance locomotives either as additional or to replace worn-out engines after the execution of the mortgage although the lien of that mortgage attaches to the locomotives, yet if nothing but an equitable title passed the lien of the mortgage only attaches to that equitable title, but if the mortgage is made of a prospective railroad to be fully equipped, the rolling stock being necessary to the operation of the road, we submit that in that case where the mortgage clearly contemplated the equipment of the road in order to operate it, that this court would be loath to hold that a vendor having knowledge of the mortgage could retain title for the original equipment on the basis of which the mortgage was made, and which was necessary to make the entire enterprise a going concern. In the case at bar it is our contention that since the whole transaction is to be construed, the law will not allow the vendor to say as against other bondholders that the mortgage is not a prior lien on this equipment. It is a case of a contract inconsistent in itself.

In a case already cited Mr. Justice McKenna says in speaking of the principles which apply to the corporeal quality of railroads:

"One of these and an elemental one, is that whatever is erected upon it becomes part of it. There are exceptions to the principle, but as we are not concerned with them, we need not state them. Applications of the principle to railroads are illustrated by the decisions of this court and by those of other courts. As to rails put down against him from whom purchased *Galveston H. & H. Railroad Co. v. Cowdrey*, 11 Wall., 459 (20:199); *United States v. New Orleans Railroad Co.*, 12 Wall., 362 (20:434); *Thompson v. White Water Valley R. Co.*, 132 U. S., 68 (33:256), even though the contract of purchase provided that the property should remain that of the vendor and he have a right to remove the same (*Porter v. Pittsburg Steel Bessemer Co.*, 122 U. S., 267 (30:1210, and cases cited); in determining the relation of the rails to the right of way, *Joy et al. v. City of St. Louis*, 138 U. S., 1 (34:843). In this case, Mr. Justice Blatchford said: "The track cannot be separated from the

right of way, the right of way being the principal thing and the track merely an incident. A right of way is of no particular use to a railroad without a superstructure and rails; the track is a necessary incident to the enjoyment of the right of way."

New Mexico v. U. S. Trust Co., ubi supra.

See also:

Palmer v. Forbes et al., 23 Ill., 301.
Hunt v. Bay State Iron Co. et al., 97 Mass., 279.
City of New Haven v. Fair Haven & W. R. R. Co., 38 Conn., 422.

We also cite to the point that the innocent purchaser for value, which includes an execution creditor, a mortgagee, and anyone claiming under such, is not affected by the agreement and that, as to him, it is waived.

Thompson v. Smith, 111 Iowa, 718; 83 N. W., 789.
Stillman v. Flenniken, 58 Ia., 450; 10 N. W., 842.
Fifield v. Farmers' National Bank, 148 Ill., 163.
Western Transportation Co., 37 Barbour, 509.

Rights of bondholders and receiver are available as a defense.

The rights of the mortgage bondholders are available here as a defense in replevin for the rolling stock as well as the rail, as Hutchins, as the successor to the rights of the mortgagees under the sale, is entitled to make this defense.

Porter v. Pittsburg Steel Co., 122 U. S., 267.
Ryles v. Knowles Loom Wks., 87 Fed., 976.

He is also entitled to make all the defenses which the receiver, whose title he received, could make and replevin would not have lain against the receiver under these circumstances.

Hart. v. Barney & Smith Mfg. Co., 7 Fed., 543.

Taking the mortgage bonds as security was a waiver of title in the plaintiff.

Taking the mortgage bonds cast the fortune of the plaintiff with the other holders of the bonds. As was said by Mr. Justice Brewer in a case where it was sought to enforce a mechanic's lien by a builder of a dock, in which it was held that the mechanic's lien was subordinate to the first mortgage bondholders, the mortgage was notice to all the world of the lien, and in that point of view the case does not show a hardship, as the plaintiff must have known that he took subject to the rights of the other bondholders. Acting with full knowledge of all the circumstances plaintiff has no right to complain if its agreement is less remunerative than if the boldholders had joined with the company in making a contract.

Toledo R. R. Co. v. Hamilton, 134 U. S., 296 (33: 905).

As a bondholder it is estopped from asserting that the mortgage does not cover all the property and rights which it professes to cover, that the rolling stock as well as the superstructure and fixtures of the road as it came into existence become instantly attached to and was covered by the mortgage.

Galveston R. R. Co. v. Cowdrey, ubi supra.

Taking the mortgage which presumably warrants that the title is in the Kona Company is clearly inconsistent.

Austin v. Hamilton, 96 Ga., 759; 22 S. E., 304.

McCormick Harvester Co. v. Lewis, 52 Kan., 358; 35 Pac., 12.

Aultman v. Silha, ubi supra.

Silver Bow Mining Co. v. Lowrer, ubi supra.

The delivery of the property and its use without claim of title for two years is a waiver of the vendor's title.

The mere delivery of the property itself has been held presumptive evidence of the waiver of the condition.

Peabody v. McGuire, 79 Me., 572; 12 Atl., 630.
Farlow v. Ellis, 15 Gray, 229.

The granting of additional time is such a waiver.

Cole v. Hines, 81 Maryland, 476; 32 Atl., 196.
Hutchins v. Munger, 41 N. Y., 155.

How much more is the definite intention that the property should be incorporated into and was an essential part of the plantation should come under the security of a mortgage being negotiated at the same time, and the security of which mortgage was taken to secure the purchase price.

The property was delivered in March of 1901. No claim of a conditional sale was made until February, 1903. The letter of the agent of plaintiff with the assent of the president and treasurer of the Kona Company upon it appears to have been within the exclusive possession of the plaintiff, and even if known was treated as of no consequence by all parties. In the meantime the property sold had been incorporated into the plantation, and was an essential part of its operating machinery; the plaintiff was retaining the note and the bonds to secure it, evidently relying upon this security to collect its debt, until the plantation was placed in the hands of a receiver. In the meantime debts had accrued on the faith of the plantation as a whole, and the situation of the parties had been materially changed. We think the failure to claim title under these circumstances or to make any claim shows a waiver of such right.

Hickman v. Rickburg, ubi supra.

The bringing of the mechanic's lien action and the proceeding in intervention is a waiver of title on the part of the plaintiff.

We submit that upon this point the case of *Van Winkle v. Crowell*, 146 U. S., 42, is conclusive unless overruled. In that case, in which the opinion was given by Mr. Justice Blatchford, it was held that "the condition of the title to the machinery on and prior to December 4, 1885, was a conclusion of law to be drawn from the undisputed facts of the case." It was further held that whenever the vendees "did any act" which showed that they had waived those things (acts to be done before acceptance of title), and accepted the machinery, the title to it vested at once in them, and as to innocent purchasers, such as the mortgagees were, the title could not be revested in the plaintiff. Belser and Parker manifested their acceptance of the machinery by giving the mortgages, after having used and operated it; and, so far as the vendors were concerned, in that case it was held that the filing of a mechanic's lien, and bringing a suit thereon which was dismissed, was a waiver of the title, the court saying (pages 50-51):

"Moreover, it is shown that, prior to the commencement of the present suit, the plaintiffs, in May, 1886, filed a mechanic's lien as respected the machinery made under the contract of March 28, 1885, admitting a credit for the $2,500 and the $500, and claiming a lien under said contract and under the three notes of December 11, 1885; that in July, 1886, they commenced a suit in a court of the State of Alabama to enforce that lien; and that that suit was dismissed by the plaintiffs without a trial on the merits, before the trial of the present suit was had. The assertion of that lien treated the property as the property of Belser and Parker, and did so after the notes of December 11, 1885, were taken. It was inconsistent with the existence in the plaintiffs of a title to the property. It treated the sale of the property to Belser and Parker as unconditional. In *Lehman v. Van Winkle*, 8 Southern Reporter, 870, the Supreme Court of Alabama held that by the suit to enforce the lien, Van

Winkle & Co. made an election to treat the title to the property as in Belser and Parker, and that that election could not be affected by a subsequent attempt to obtain the property by an action of detinue. The proceedings to enforce the lien were pending when the present suit was brought, in November, 1886."

The force of this case is not disposed of in the opinion on the former hearing, in which it is said (page 347):

"It is quite true, as we have said, that the assertion of a lien is inconsistent with the assertion of a title (*Van Winkle v. Crowell*, 146 U. S., 42), and, therefore, if a lien had been established by judgment or decree, the title would be gone by force of an adjudication inconsistent with its continuance";

for in *Van Winkle v. Crowell* the lien *did not go to judgment*. What was there held was that the giving of a mortgage by the vendee waived a condition favorable to the vendee, and the bringing of the mechanic's lien suit which was dismissed was a waiver on the part of the vendor. Now, if the title had not passed, there was no choice on the part of the vendor in that case any more than in the case at bar. Therefore, as has been said by this court:

"The first decision is the law of the case, and must control its disposition; but the rule does not apply to expressions of opinion on matters the disposition of which was not required for the decision."

Barney v. Winona, &c., Railroad Co., 117 U. S., 228, 231.

So, here, the suggestion that the mechanic's lien suit must pass to judgment is immaterial. The title was waived by the giving of the mortgage by the Kona Company, the incorporation of the material into their plantation as an essential part, the granting of the order of sale in the receivership proceeding showing assent by vendor taking the mortgage bonds as an innocent bondholder, bringing of the mechanic's lien, and the joining in the foreclosure proceedings treating the title as having passed by the vendee, thus

showing its intent. Moreover, in this case there were "innocent mortgagees."

This court has said of waiver by election:

"In *Connihan v. Thompson*, 111 Mass., 270, at p. 272, the court said: 'The defense of waiver by election arises where the remedies are inconsistent; as where one action is founded on an affirmance and the other upon the disaffirmance of a voidable contract or sale of property. In such cases, any decisive act of affirmance or disaffirmance, if done with knowledge of the facts, determines the legal rights of the parties, once for all. The institution of a suit is such a decisive act; and if its maintenance necessarily involves an election, to affirm or disaffirm a voidable contract or sale, or to rescind one, it is generally held to be a conclusive waiver of inconsistent rights, and thus to defeat any action subsequently brought thereon.'

"The rule established by these cases is that any decisive act by a party, with knowledge of his rights and of the facts, determines his election in the case of inconsistent remedies, and that one of the most unequivocal methods of showing ratification of an agent's act is the bringing of an action based upon such an act."

Robb v. Voss, 115 U. S., 13.

The attempt even though it be ineffectual, to establish a materialman's lien on property sold is a waiver of the condition in a conditional sale, and an abandonment of the title reserved.

Hickman v. Richburg, ubi supra.

National Foundry, etc., Wks. v. Oconto, etc., Co., 113 Fed., 793.

Kenney v. Townsend, 124 Iowa, 332; 100 N. W., 48.

Lehman v. Van Winkle, 92 Ala., 443; 8 South., 870.

In some jurisdictions bringing an action for the price is such a waiver.

Richards v. Schreiber, 98 Iowa, 422.

Marston v. Baldwin, 17 Mass., 611.

Smith v. Barber, 153 Ind., 322.

Dowagiac Mfg. Co. v. White Rock Lumber & Hardware Co. (S. Dak., 1904), 99 N. W., 854.

The better rule is that waiver is shown by an action coupled with the claim of some further right.

The better rule is that such an action accompanied by an attachment of the property is a waiver on the theory that the attachment recognizes the title as being in the vendee.

Crompton v. Beach, 62 Conn., 25.
Smith v. Barber, 153 Ind., 322.
Bailey v. Hervey, 135 Mass., 172.
Fuller v. Eanes, 108 Ala., 464; 19 So., 366.
Heller v. Elliot, 45 N. J. L., 564.
Button v. Trader, 75 Mich., 295.
Parke, etc., Co. v. White River, etc., Co., 101 Cal., 37.
Ormsby v. Dearborn, 116 Mass., 386.
Allbright v. Meredith, 58 Ohio St., 194.

The presentation of the claim and intervention in the receivership is also a waiver.

The presentation of a claim against an estate, instead of retaking possession, is such a waiver.

Seavey v. Potter, 121 Mass., 297.
Holt Mfg. Co. v. Ewing, ubi supra.

The latter case was decided upon the authority of *Ormsby v. Dearborn, ubi supra*, to the same effect, but the plaintiff sought to avoid his election on the ground that he did not know the real condition of the estate when he presented his claim and afterwards that it turned out that the claims largely exceeded the assets, but, as there was nothing in the record tending to show that the plaintiff was misled by anyone as to the condition of the estate, the court overruled the point, which is the contention of the plaintiff in this case. He cannot now change his election. To this point that a party is bound by his election, we cite:

Butler v. Hildrith, ubi supra.
Holden v. Metropolitan Nat. Bank, 151 Mass., 112.; 23 N. E., 733.
Whiteside v. Brawley, 152 Mass., 133; 24 N. E., 1088.

The cases of Seavey *v.* Potter and Ormsby *v.* Dearborn were fully discussed and considered in a subsequent case in Massachusetts, in which it was held that a replevin action brought upon a rescission of a sale was not waived by a subsequent proof in insolvency, the Court distinguishing the cases cited, on the ground that in Seavey *v.* Potter it was necessary in order to complete the rescission of the sale to return certain notes, but instead of being returned were retained and one proved in insolvency. The election not being complete until the notes were returned, therefore the proof in insolvency was the first effectual election and could not subsequently be recalled. In other words, the first election, if completed by the party, is a waiver, and cannot be subsequently recalled, nor is that election waived by a subsequent inconsistent act when the party is still maintaining his original claim.

The procedure of intervention was in accordance with the rules of law prevailing in receiverships, and when property is in the hands of a receiver this is an available remedy.

Fosdick v. Car Co., 99 U. S., 256; 25 L. Ed., 344.

Central Trust Co. v. Tex. & Pac. Co., 23 Fed., 1673

The lien was waived by the conduct of the plaintiff with respect to the receivership.

It is well said by the Alabama court that the lien is waived by any inequitable act. It is clearly inequitable conduct (whether or not any specific act in this case constitutes a waiver by the plaintiff) to encourage the carrying on of the plantation under a receivership, to join in the proceedings, to file its claim of lien in order to retain a priority against the funds in the hands of the receiver (a claim which would be subordinate to the expenses of the receivership), and then after a year of unsuccessful operation, when the property is sold to pay the expenses of the receivership, to turn around and claim the property itself. We place this

ground not on any specific act, but because plaintiff's whole conduct conclusively shows a waiver.

Hinchman v. Pt. Defiance Ry. Co., 14 Wash., 349; 44 Pac., 867.

Engine Co. v. Hall., 89 Ala., 630; 7 So., 187.

Irrespective of all the other considerations the delay in asserting the title under the circumstances is of itself a waiver.

Patten v. Smith, 5 Conn., 196.

Leatherbury v. Conner, 54 N. J. L., 172; 23 Aal. 684.

Gorham v. Holden, 79 Me., 317; 9 Atl., 894.

Owenby v. Swann (Tenn.), 59 S. W., 378.

The Assent of the Vendee.

But it may be said that we have been merely arguing, under a claim of waiver, what the court has already decided against us upon the ground of election. But we have disposed of this by showing that election is, as the court held on the former appeal, "a choice shown by an overt act between two inconsistent rights." There must be two, whereas waiver does not require that there shall be two rights, but that there shall be an intention to relinquish one. This court assiduously abstains from dealing with the questions either of waiver or estoppel, and continues (pages 346-347):

"In all such cases the characteristic fact is that one party has a choice independent of the assent of any one else. But if a man owns property he has no election to transfer it to another. He cannot make the transfer unless the other assents. And equally, if he owns property subject to be divested by the performance of a condition, he has no election to divest it without performance. The other party must assent. Transfer is very different from election, and requires acts of a different import on the part of the owner, and corresponding acts on the part of the transferee.

"In the case at bar there is no pretense that the appellant's conduct purported to convey the property to the Kona Com-

pany in advance of the performance of the stipulated conditions. The case stands on election alone, and the appellant had no right to elect in the sense of the argument. It could not obliterate the condition and leave the contract in force. It may be that it had an election to avoid the contract altogether, but, if so, it did not attempt to do it. It insisted on the contract as the ground of its claim to a lien for the price of the goods. The election supposed and relied upon is an election to keep the contract in force, but to leave out the reservation of title. It must be kept in mind that the effect attributed to the assertion of the lien is attributed to it as a strictly unilateral act, not as an offer to which an assent might be presumed. As such an act the appellant could not give it the supposed effect. It is quite true, as we have said, that the assertion of a lien is inconsistent with the assertion of a title, Van Winkle *v.* Crowell, 146 U. S., 42, and, therefore, if a lien had been established by judgment or decree, the title would be gone by force of an adjudication inconsistent with its continuance. But the assertion of a lien by one who has title, so long as it is only an assertion and nothing more, is merely a mistake. It does not purport to be a choice, and it cannot be one because the party has no right to choose. The claim in the lien suit, as was said in a recent case, was not an election but an hypothesis. Northern Assurance Co. *v.* Grand View Building Assoc'n, 203 U. S., 106, 108. The fact that a party, through mistake, attempts to exercise a right to which he is not entitled does not prevent his afterwards exercising one which he had and still has unless barred by the previous attempt. Snow *v.* Alley, 156 Mass., 193, 195" (Tr., pp. 78, 79).

The substance of this is, as we have already laid down in our attempted definition of "waiver," that waiver is founded on an assent by the other party, either implied or expressed, and particularly must this be true where title is to be divested or vested, and it is also true that, under the doctrine of election, pure and simple, "there is no pretense that the appellant's conduct purported to convey the property to the Kona Company in advance of the performance of the stipulated conditions." But in our former brief, and in this, our whole position rests on the proposition that the plaintiff's conduct

"purported to convey the property to the Kona Company in advance of the performance of the stipulated conditions," because there was both implied and express consent to this conveyance. The Hawaiian court entirely misconceives the language which we have quoted, and says upon this point:

"As to the claim of waiver, the passing of the title being subject to a condition precedent, the subsequent election of the plaintiff to treat the title as having passed and its waiver of the condition precedent are but two aspects of the same question. The matter of waiver was fully discussed in connection with the question of election in the defendant's brief in the Supreme Court as appears by that brief now filed with us and by its summary in the official report. Although the decision of the Supreme Court does not use the term 'waiver,' it sufficiently appears throughout that waiver of the condition precedent is the matter under discussion, as, for example, when the opinion says 'the election supposed and relied upon is an election to keep the contract in force but to leave out the reservation of title' (205 U. S., 347). If the plaintiff's acts, relied on by the defendant, would amount to a waiver under any circumstances, the decision of the Supreme Court proceeds upon the broad ground that the title to goods sold subject to a condition precedent cannot be passed by any unilateral act of the vendor" (Tr., pp. 91, 92).

We observe, further, that although the plaintiff may have had no right to choose between the assertion of a lien and the retention of title, it had a right to choose whether it would waive the condition of the sale or retain the title, and if, either expressly or impliedly, that waiver was assented to, we do not perceive on what principle it can be said that it had no right to choose. Plaintiff's mistaken hypothesis was in assuming that he would get his money quicker and more surely by bringing the mechanic's lien, by intervening in the suit, and by procuring a sale subject to his bond and to the mechanic's lien, and, certainly, any such mistaken hypothesis gives him no right to choose again. That was a mistake of judgment which binds him.

The cases cited by this Court sustain our proposition.

That portion of the opinion of this Court in the Northern Insurance Company case, in which the word "hypothesis" is used, is well worth quoting:

"We pass such doubts, because we are of opinion that, however the election be stated, it is not made out. *The plaintiff in the former action expressed on the record its reliance upon the facts upon which it now relies. It did not demand a judgment without regard to them and put them on one side, as was done in Washburn v. Great Western Insurance Co., 114 Massachusetts, 175, where this distinction was stated by Chief Justice Gray.* Its choice of law was not an election but an hypothesis. It expressed the supposition that law was competent to give a remedy, as had been laid down by the Supreme Court of Nebraska and the Circuit Court of Appeals for the Circuit. Home Fire Insurance *v.* Wood, 50 Nebraska, 381, 386; Firemen's Fund Insurance Co. *v.* Norwood, 16 C. C. A., 136. So long as those decisions stood the plaintiff had no choice. It could not, or at least did not need to, demand reformation, if a court of law could effect the same result. It did demand the result, and showed by its pleadings that the path which it did choose was chosen simply because it was supposed to be an open way. Snow *v.* Alley, 156 Massachusetts, 193, 195."

Northern Assurance Co. of London *v.* Grand View Building Association, 203 U. S., 106, 108.

In Snow *v.* Alley, in a previous action, the plaintiff had recovered judgment on a theory consistent with his theory in the action before the Court. His pleadings, however, presented an inconsistent construction, but the defendant had defeated him so far as the inconsistent construction of the transaction was concerned and a recovery had been had upon a consistent construction which the court held to be also open under the pleadings. Whatever may be said of this case upon the doctrine of election, it cannot be said that he waived his right when the other party was refusing to accept such waiver and contested it. Our proposition in this case is, and has been from the first, that the waiver when assented to and accepted becomes binding upon the plaintiff.

In the Northern Assurance Company case it will be ob-

served that the "mistaken hypothesis" was one of the Nebraska Court and the Court of Appeals, for which plaintiff was not responsible. Moreover, he stated his case and relied upon the identical facts in each action, and was only misled in supposing he had a remedy because the Courts had so told him.

It is sufficient to say that we are not claiming a waiver based on any unilateral act, except as the assent of the vendee may be presumed, which destroys the unilateral character of the act.

Assent May be Presumed.

Being beneficial, the assent of the vendee to a waiver of the condition is presumed in the case of conditional sales. Says Mr. Benjamin:

"No authority is needed, of course, for the proposition that the party in whose favor the condition has been imposed may expressly waive it."

Benjamin on Sales, 5th Eng. Ed., p. 563; 7th Am. Ed., p. 550.

The general proposition, so broadly stated by Benjamin, is sustained by Professor Mechem:

"One party alone to whom the performance of some obligation is owing by the other may also waive or surrender the performance of that obligation, either entirely, or in respect of time, place, manner or extent of its fulfillment."

Mechem on Sales, sec. 1070.

"But as this condition of payment or security, whether express or implied is, as has been seen, for the benefit of the seller, he may waive it if he so elects. This waiver, like the condition itself, may be either express or implied * * * and can be inferred from circumstances."

Mechem on Sales, 549.

An undisclosed intention not to waive a condition does not defeat the waiver in cases in which the title was not to pass until payment.

"But when he voluntarily does the act, which, unexplained, constitutes a waiver, he not only may be presumed to intend it, but he changes the relations between himself and the purchaser in respect to the property and the contract of sale. If he would impose any condition upon the purchaser, affecting those new relations, or any obligation not implied from the transaction itself, he should manifest his purpose in some mode, so that the other party may assent or dissent. The purchaser may be presumed to assent to a waiver."

See also

Upton *v.* Sturbridge Cotton Mills, 111 Mass., 446.
West *v.* Platt, 127 Mass., 367.

This doctrine of an implied waiver runs through the very numerous cases which we have cited and a host of others, and has always been recognized. Gorham *v.* Holden (79 Me., 317; 9 Atl. Rep., 894). We call particular attention to the cases of Leatherbury *v.* Connor, *ubi supra*, and Owensby *v.* Swan, *ubi supra*, that mere inaction may waive where clearly the assent is presumed. But the decision on the former appeal impliedly recognizes this rule, for the case of Harkness *v.* Russell, 118 U. S., 663, on which that part of the opinion in regard to the conditional sale is rested by Mr. Justice Holmes, cites and relies on Coggill *v.* Hartford, &c., R. R. Co., 3 Gray, 555, and quotes that decision as holding that the vendor "if guilty of no laches may reclaim the property." The exact words of Mr. Justice Bigelow, in the leading case referred to, are:

"The title continues in the vendor until the conditions of sale and delivery are complied with by the vendee or *are waived by the vendor*,"

and the most recent case, in Massachusetts, sustains this rule—that an action brought for the price, though without

satisfaction, necessarily waives title (Whitney *v.* Abbott, 191 Mass., 59; 77 N. W., 524).

The waiver was in fact assented to by the vendee.

The cases which we have cited apparently hold that even without express assent, the assent of the vendee would be implied, but in this case there is ample authority to show assent by the vendee—it mortgaged the property, it affixed it to the realty, it incorporated it as an essential part of the plantation, the receiver sought to sell it, and did sell it, What more decisive acts of assent are needed?

III.

The plaintiff is estopped to claim this property as against the defendant, who has the rights of the mortgage bondholders, the creditors, and the receiver who represented the creditors and bondholders.

This point is raised by assignments of error 11, 12, and 25.

Estoppel by Record.

It is estopped by the record, having placed on record in the suit in intervention its declaration that the property was sold outright, that it sought a lien on it for that reason, having asked that the receiver might operate the property, participated in the incurring of debts by the receiver, and having asked that the property might be sold to pay those debts, subject simply to the mortgage lien and its mechanic's lien, it cannot mend its hold, when that hold failed, at the expense of the defendant, who has the rights of the receiver, the bondholders and the creditors. Dickerson *v.* Colegrove, 100 U. S., 59; Porter *v.* Pittsburg Co.; Ryles *v.* Knowles Loom Works; Hart *v.* Barney Co., *ubi supra.*

This proposition is sustained by the authorities already cited, and we add:

"It may be laid down as a general proposition, that where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."

Davis *v.* Wakelee, 156 U. S., 680, 689.

An estoppel in pais is shown.

We need only refer to the cases which we have already cited, under the head of "Waiver," which show that the defendant here, who has bought at a sale to liquidate the debts of a receivership carried on under the direction of plaintiff itself, cannot be met with notice at the sale of a different claim than that made during the progress of the receivership by which the debts were being contracted. If this proposition were true, then plaintiff would have the power to play fast and loose; to allow its property to go in to give form and substance to the receivership, and when debts had been contracted on the faith of it, to turn around and pull its property out by notice given at the sale. Again, it is estopped as to the defendant, who has purchased the interests of the bondholders in the property, by the fact that it has allowed it to become affixed and to become an essential part of the plantation mortgaged.

We have fully covered this proposition by the cases already cited.

IV.

The court should, when asked, have found the value of the separate articles sued for.

This point is raised under assignment of error 9.

In an action of replevin brought to recover different articles, having no identity of character, the value should be

assessed for each distinct article. The defendant has a right to return certain articles, and to receive credit therefor *pro tanto*. It, also, may be that some of the articles can be returned and some cannot, therefore the separate value should be ascertained so that credit can be given, *pro tanto*, for such articles as can be returned. In this case certain of the articles were sold with the intention and understanding that they should be affixed to the freehold, and so were placed in a position where they could not be returned. The plaintiff thus disposed of certain articles, which he knew were to be, and could only be used when, attached to the freehold, putting the defendant in a position where some of these articles, apparently of great value, could not be returned. The complaint in this case alleges the sale of the materials sought to be replevied at specified prices for the different articles, and the evidence shows the value of each item or article sought to be replevied. The trial court in its decision and findings should have found the value of each article separately.

18 Encyc. Plea. & Prac., 581.

The judgment should follow the verdict and show the separate value of each article, so that by the return of any one or more articles the judgment may be satisfied *pro tanto*.

18 Encyc. Plea. & Prac., 602.
Cobbey on Replevin, pp. 605, 606.
Shinn on Replevin, sec. 627.
Wells on Replevin, sec. 454, 761.
Bennett *v.* Butterworth, 8 How. (U. S.), 124.
Jackson *v.* Nelson, 39 S. W., 315.
Clopton *v.* Goodbar, 55 S. W., 972.
Sayres *v.* Holmes, 42 Tenn., 259.
Brady *v.* Cook, 68 Miss., 636; 10 So. Rep., 56.
Whitefield *v.* Whitefield, 40 Miss., 353.
Rowland *v.* Mann, 28 N. C., 38.
Cook *v.* Halsell, 65 Tex., 1.
So. Warehouse Co. *v.* Johnson, 85 Ala., 178.
Nolan *v.* Leech, 10 Ark., 504.
Hanf *v.* Ford, 37 Ark., 544.
Black *v.* Black, 74 Cal., 520.
Williams *v.* Morrison, 29 Fed., 282.

V.

The action cannot be maintained because either there was a pending proceeding for the same purpose in the receivership matter, which is still pending, or else has been adjudicated against the plaintiff.

This point is raised under assignment of error 10.

It is familiar law that no one can maintain two actions in the same jurisdiction upon the same cause of action. Plaintiff had what he calls an equitable replevin pending when this action was brought, and the equitable replevin is either now pending or else has been disposed of by the two appeals. Plaintiff proceeded in it, took depositions after the institution of this action, and if it had prevailed in that action could have claimed satisfaction.

Fosdick v. Car Company, 99 U. S., 256.

Further, the plaintiff has been defeated in that action, and it has been held that it failed to make any showing of title to the property sold (Tr., 108).

VI.

The court erred in allowing amendments increasing the ad damnum from $15,000 to $20,000, and again to $22,000.

This point is raised under assignments of error 13 and 14.

The defendant had given a bond and incurred liabilities to sureties agreeing to return the property or pay its value, and it was in the option of the plaintiff and not of the defendant to fix the value upon which the replevin bond was given by the plaintiff and the redelivery bond given by the defendant were based. By the Hawaiian Statute (Revised Laws, sec. 2102, sub-sec. 4) the affidavit must state the actual

value of the property. If this can be increased it puts the defendant in a position of disadvantage which he might not have assumed when he gave the original redelivery bond. If such an amendment can be allowed, then a bond could be given on a sworn affidavit of one thousand dollars, and the property at the trial proved to be of one hundred thousand dollars in value, and recovery had against the defendant, who might, had the allegation been different, submitted to judgment against him. Plaintiff should be bound by his own valuation.

"The sworn statement of value made at the time when he (plaintiff) is seeking to recover the property will estop him from asserting a different one at another time."

Wells on Replevin, sec. 660. See also sec. 453, 569.
Wash. Ice Co. *v.* Webster, 125 U. S., 426.
Wash. Ice Co. *v.* Webster, 62 Me., 341.
Cyclone Steam Plow Co. *v.* Vulcan Iron Works, 52 Fed., 920-926.
Parker *v.* Simons, 8 Met., 212.
Swift *v.* Barnes, 16 Pick., 194-197,
Sutherland Damages (last ed.), sec. 504.

This court said, in the Washington Ice Company case, above cited, quoting from *Leighton v. Brown*, 98 Mass., 515:

"The appraisal made in the replevin suit is conclusive against the party by whom it was made (Parker *v.* Simonds, 8 Met., 205), but it is not admissible in evidence against the present plaintiff who as defendant in the replevin action had no agency in procuring this valuation. Kafer *v.* Harlow, 5 Allen, 348" (p. 440).

In the Cyclone Steam Plow Company case this rule was followed, and it was said that the valuation was conclusive upon the plaintiff in the absence of evidence that he was misled and that he made it in ignorance of the actual condition of the property.

The same rule is laid down in Oregon.

"Thus the recital, in a replevin bond, of the value of the property, is sufficient evidence of the value in an action on the bond, and estops the plaintiff and his sureties from denying the same. Wiseman *v.* Lynn, 39 Ind., 250. To the same effect, see 1 Brandt, sur. sec. 45; Wells, Repl. sec. 453; Swift *v.* Barnes, 16 Pick., 194; Tuck *v.* Moses, 58 Me., 461; Trimble *v.* State, 4 Blackf., 435; McFadden *v.* Fritz, 110 Ind., 1, 10 N. E., 120; Ice Co. *v.* Webster, 125 U. S., 426, 8 Sup. Ct., 947, 31 L. Ed., 799."

Capital Lumbering Co. *v.* Learned *et al.*, 36 Or., 544; 59 Pac., 454, p. 456.

These cases are suits on the replevin bond, but there are authorities which hold the same rule to apply in the replevin action itself.

Thus, in Minnesota, it has been held that except in exceptional cases the value so fixed by the plaintiff is conclusive upon him, the court saying:

"The statement as to the value of the property made in the bond and affidavit, at a time when the plaintiff is seeking to obtain possession, must be regarded as estopping him from asserting a different value after fixing it at such a time. Plaintiff should not be heard to complain of the value so fixed by him, save in exceptional cases. Wells Rep., secs. 569, 560, and cases cited. The presumption is that the defendant relied and acted on this statement as to value in subsequent proceedings—such for instance, as when he availed himself of the privilege of rebonding and retaining possession. As remarked by Mr. Wells, the enforcement of this rule is calculated to promote a reasonable estimate of value, in the bond and affidavit by a party seeking to obtain possession."

Weyerhaeuser v. Foster, 60 Minn., 223.

So in New Mexico, *Butts v. Wood*, 4 N. M., 187; 16 Pac., 617—these cases being in the original action.

The New Mexico case relies on the doctrine which we have already argued—a *solemn admission* in the pleading, citing Greenleaf on Evidence, sec. 27, it being an admission of the pleadings which had been *acted upon*.

No reason is given by the Hawaiian Court for overruling

this exception. The only conceivable reason is that the amendment served to release the sureties, and therefore that the defendant was not dammified. But this does not dispose of the point. It was a solemn admission made for the purpose of getting an advantage, namely, the possession of the property, and whether the sureties on the redelivery bond were released or not, defendant remained liable, and if he were unable to return the property, a risk which he took by obtaining a redelivery, his liability was materially increased by the amendment in case of it being impossible to redeliver. This is not an academic question but is now pending between the parties to this action.

VII.

Replevin cannot be maintained for articles which are sold to be affixed to the soil and have become an essential part of the plantation.

This point is raised under assignment 25.

It has been held that where machinery has been sold, which the plaintiff understood when purchased was to be attached to the realty, he cannot maintain replevin.

Jenks *v.* Caldwell, 66 Mich., 422; 33 N. W., 528.

The same rule has been held in regard to buildings by the court in Nebraska, the court saying:

"Replevin is in any case a harsh remedy, forbidding the plaintiff to take property upon his particular allegation of ownership and before any opportunity to try the issue. The court should be very jealous of extending the action beyond the case to which it was designed to apply."

Oskamp *v.* Crites, 37 Neb., 837; 56 N. W., 394.

This point still more forcibly emphasizes the necessity of a specific finding of value, because if replevin will not lie for the articles which are affixed, it may lie for some of the other

articles. The facts in this case show that the property could not be taken on a writ of replevin, nor when a redelivery bond was given could it be returned except symbolically.

VIII.

There was manifest error in overruling the exception to the exclusion of the testimony of the witness Scott as to the condition of the railroad material.

This point is raised under assignment of error 15.

W. W. Bierce, president of the plaintiff, had testified to the value of the property. His testimony was sufficient to sustain a value of $22,000, although the affidavit in replevin had contained the sworn statement that its value was $15,000 (Tr., p. 38), and although in the equitable replevin, dated February 12, 1903, the sworn allegation was "that on account of wear and tear and *deterioration* it was not then worth to the plaintiff to exceed $10,000" (Finding 21, Tr., p. 107).

The defendant summoned a witness, who had been summoned by the plaintiff to prove the condition of the property, so far as rights of way were concerned, and who had been its receiver, and had built a part of the road. The court below overruled this exception on the ground that counsel for defendant had admitted that he was not proving value. But an examination of the record will show (Tr., pp. 13 and 14) that the objection was "that this witness is not qualified as an expert *to prove the condition* or prove the value *by showing its condition*," and after counsel having remarked, "I am not trying to prove the *value*"—meaning evidently that he was not offering the witness as an expert on prices, namely, market value in dollars and cents—to the remark of counsel on the other side, "Well then it is immaterial," answered, "It is material as to *deterioration*," to which counsel for plaintiff replied, "This witness has not qualified to testify as to the deterioration of railway ma-

terial," and the objection was thereupon sustained. He was not allowed to state what difference there was in the material, its appearance, whether the rails appeared more worn, or the engines worked less well than on the day of taking possession, thus shutting out all the evidence on the part of the defendant on the question of value.

The price for which the material was sold was some evidence of the value, and its present condition, in comparison with the condition when sold, was a fact to be taken in consideration. The defendants were not bound by the testimony of Bierce as to value. There was no market value at the place where the property was and it was eminently proper to have admitted this evidence.

Isabel *v.* N. Y. & New Haven Ry. Co., 25 Conn., 556.

Persons may testify as to the condition of a street crossing or of the facts showing the condition of a railway track where the ultimate fact is the safety of either.

City of Parsons *v.* Lindsay, 26 Kan., 462.

Mo. Pac. Ry. Co. *v.* Jarrard, 66 Tex., 560.

In fixing value in replevin it is not necessary that witness be an expert; if he has some knowledge of the particular property his testimony is competent.

Fox *v.* Cox, 20 Ind. Ap., 61; 50 N. E., 92.

In an action on a fire insurance policy on the question of over-valuation, the Massachusetts court said:

"The plaintiff had at the trial a right to inquire as to the nature and quality of the different parts of the building, the cellar inclusive, of any person acquainted with building, and therefore competent to judge in relation to it."

Bardwell *v.* Conway Ins. Co., 122 Mass., 90.

So in an action to recover for mason work, whilst a witness who was not an expert cannot testify as to the character

of the work, the question, "What was the condition of the wall when you examined it?" is admissible.

Reynolds *v.* Shanks, 23 Wisc., 307.

The question is so elementary that it is difficult to furnish authority to the proposition that it is proper for the court to be informed of the condition of property, the value of which it has to judge.

In view of the fact that the court found the value of the property two thousand dollars more than was claimed even by the amended complaint, and twelve thousand dollars more than the plaintiff had sworn it was worth to him one year before, because of its *deteriorated* condition, we submit that it was a gross hardship to this defendant to prevent him from showing the present condition of the property, in order that the court might judge whether it had deteriorated so that it was worth not more than ten thousand dollars, as sworn to by the plaintiff itself.

We respectfully ask that the judgment of the Supreme Court of Hawaii be reversed.

DAVID L. WITHINGTON,
W. R. CASTLE,
ALDIS B. BROWNE,
ALEX. BRITTON,
J. W. CATHCART,
Attorneys for Appellant.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 447.

CLINTON J. HUTCHINS, TRUSTEE, APPELLANT,

vs.

WILLIAM W. BIERCE, LIMITED, A CORPORATION.

REPLY BRIEF FOR APPELLANT.

DAVID L. WITHINGTON,
ALDIS B. BROWNE,
ALEX. BRITTON,
For Appellant.

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REPLY BRIEF FOR APPELLANT.

I.

Substituting "appellant" for "appellee," we justly remark in turn that the record in the present case "shows a most persistent and aggravated attempt to prolong the litigation and defeat the manifest rights of the appellant" (Appellee's Br., p. 3). In proof whereof the record shows:

(1) May 14, 1902, its institution of a mechanic's lien action (Finding 14, Tr., p. 106). Discontinued January 28, 1903 (Finding 19, Tr., p. 107).

(2) Meantime and on November 24, 1902, its intervention in the receivership suit by claim under a lien and as mortgagee of the railroad equipment, with a prayer that the property might be sold in that proceeding subject to this claim (Finding 17, Tr., p. 106). The attempt to make such

sale, and its failure on December 4, 1902, and again December 15, 1902 (Finding 18, Tr., p. 107).

(3) An attempted replevin. Denied February 5, 1903 (Finding 20, Tr., p. 107).

(4) An equitable replevin by intervention in the receivership proceedings on February 12, 1903, asking for payment, and if not obtained, then for delivery of the property (Finding 21, Tr., p. 107), which was disposed of by the order of sale of all the property April 20, 1903 (Finding 23, Tr., p. 107), and the confirmation of sale June 1, 1903 (Finding 26, Tr., p. 108).

(5) June 5, 1903, an appeal to the Supreme Court of Hawaii from the order confirming sale, which was dismissed June 4, 1904 (Finding 27, Tr., p. 108).

(6) August 25, 1903, writ of error to the order of sale. Dismissed by the Supreme Court of Hawaii November 21, 1904, on the facts, the record failing to show that the plaintiff had any title to any of the property ordered to be sold (Finding 29, Tr., p. 106).

(7) July 20, 1903, the institution of the present action.

(8) February 25, 1905, petition and motion for rehearing and re-argument in the Supreme Court of Hawaii of a decision final and conclusive at the date of the filing of such petition (Tr., pp. 59-60).

(9) The appeal to this court from a final decision of the Supreme Court of Hawaii, and from which no appeal lay from the 28th day of January, 1905, until the 3rd day of March, 1905, the date of the passage of the act granting the right of appeal to this court.

(10) Motion for final order in the Supreme Court of Hawaii (Tr., pp. 80-81). Denied by that court September 10, 1907 (Tr., pp. 83-85).

(11) A petition for mandamus, filed in this court November, 1907, under which rule issued December 23, 1907, and which seems to have been abandoned, as no notice was ever given under it.

If there has been pernicious activity in this case, it is certainly not all on the side of the present appellant, and it hardly lies—in view of this record—with the appellee to now contend, when we are asking to present for the first time in this court the entire merits of the cause (which merits have never been considered by this court), that by the application of a technical rule of law we are precluded from its presentation not by any act on our part, but by an act of its own procuring, viz., the taking of an appeal from a decision based only on a part of the facts and a part of the law of the cause, and the application of the proposition that an appeal having been taken to this court by it, we are now, in an appeal in which we present all the merits, precluded from being heard.

II.

The fundamental assumption of the appellee's argument that *all* the findings of fact and conclusions of law now before this court were before the court on the former appeal is answered in our main brief. The fallacy of appellee's argument rests in the implication, which it skillfully avoids stating in express terms, that the findings of fact made by the Circuit Court were sufficient to raise every question of law which might be presented in the record, for appellee admits that "this court will not review the facts in such case," *i. e.*, facts which do not appear in the findings

(Br., p. 15). Therefore it can only present such questions of law as arise from the facts which are found. Applying this to the present case, we submit the language of Mr. Justice Holmes in the former opinion is only susceptible of one conclusion, viz., that in order that the defendant might bring the case to this court it sustained appellant's appeal on the single point of election, and that *for that purpose* by the Supreme Court of Hawaii "the findings of fact were *taken* to be true." The word "taken" was used by the court, we submit, in this sense only. If the court had intended to say that they were adopted for any other purpose than the purpose we have indicated, it would have said the findings of fact were "held" to be true, not "taken." But this is shown by the action of the court below, which has now found the facts which raise the questions of waiver and estoppel *in pais*, by record and by judgment, the pending proceeding, and various errors in ruling upon the exceptions.

III.

The findings of the Circuit Court which appellee claims dispose of our contention of waiver and estoppel, have not been held against our contention "by the court below to be supported by the undisputed evidence" (Appellee's Br., p. 19). The opinion of the court cannot be considered. The statement of facts found by it is what is decisive. We are seeking to review this very portion of the decision, in that it is said that this court has decided that the findings of the Circuit Court are not open to dispute *in any event* (Tr., p. 91). All the Hawaiian court says is that "the material facts are undisputed" (Tr., p. 91) and that the "findings are supported by undisputed evidence, *in so far as they are findings of material facts and not statements of legal conclusions*, or immaterial statements varying or contradicting written instruments." The court having now found the facts, and not mixed facts and legal conclusions, our contention is that the

case is to be decided on these facts, and not on the legal conclusions contained in the findings of the Circuit Court under the head of "findings of fact," and that, further, we are entitled to the benefit of those facts found by the Supreme Court below which do not appear in the findings of the Circuit Court and which overthrow its legal conclusions. Thus the findings of the Circuit Court on waiver (Nos. 11 and 12) are confined, as this court held, upon the former appeal, simply to the question of whether the election to bring the mechanic's lien action was conclusive upon the rights of the plaintiff. We are predicating waiver not on this act alone, but on a long course of events wherein this appellee was actor and on the express and implied assent of the Kona Sugar Company, its receiver, its creditors, and bondholders, while the question of estoppel is not found upon at all.

IV.

The cases which are cited by appellee to the point that there is nothing open on the second appeal because the court of Hawaii has simply obeyed the mandate of this court do not sustain the proposition, because they overlook the essential question—so fully argued in our main brief—what that mandate was. Take, for instance, the case of *Stewart v. Salamon*, 97 U. S., 361. The only question in that case was "whether the note was originally solvable in confederate currency or the legal currency of the United States." The Circuit Court held that it was solvable in legal currency. This court held that it was solvable in confederate currency. This decided the whole case. It is inapplicable to the case at bar. As was said in a case cited in our main brief which we requote:

> "The case is quite different in this respect from "those in which the whole case, or all but a subsid- "iary question of accounting, had been brought to "*and decided* by this court upon the appeal, as in the

> " case principally relied on by the petitioner, *Stewart*
> " *v. Salamon*, 94 U. S., 434, and 97 U. S., 361," etc.
> *In re Sanford Fork & Tool Co.*, 160 U. S., 247, 259.

So, also, in *Tyler v. Magwire* (17 Wall., 253), wherein this court, upon the original appeal, had reversed the decree of the Supreme Court of Missouri, and held the legal title to the land there in dispute to be in Magwire (8 Wall., 650). Whereupon the Supreme Court of the State, instead of executing the mandate of this court, proceeded to hold that as the party in whose favor the mandate ran was thus held to be the owner of the legal title, he had a complete remedy at law and could not sustain his petition in equity, which was accordingly dismissed. On the second appeal this court, after extended review, held in effect that it had decided the whole case, including, of necessity, recognition of the right to proceed in equity, and its former decree and mandate must be given such effect. At page 284 the court states the rule thus:

> "It has been settled, says Mr. Justice Grier, by the
> " decisions of this court, that after a case has been
> " brought here and decided and a mandate issued to
> " the court below, if a second writ of error is sued
> " out it brings up for revision nothing but the pro-
> " ceedings subsequent to the mandate. None of the
> " questions which were before the court on the first
> " writ of error can be reheard or examined upon the
> " second, as it would lead to endless litigation."

Our position is in entire accord with this holding. We do not seek to reargue the single question which was before this court and decided on the former appeal in this case. *Contra*, we are now here with full findings of fact made by the Supreme Court below, on which, we respectfully insist, we are entitled to argue the matters of law, which (excluding the question of election heretofore decided by this court) may properly arise on such findings.

In short, we now have a statement of facts from the Supreme Court below in precise accord with the Practice Act of

1874, which this court, on the former appeal, in terms held should be made in all cases coming from the Territory of Hawaii. It is thus plain that the entire case, with proper findings, is now for the first time before the court. The single point heretofore ruled is, of course, excluded from further consideration. It is just as clear that all other questions which properly arise upon these complete findings have not been here adjudicated and are hence properly open for argument and decision. If that were not so, then, we submit, the effect would plainly be that this appellant has not had his day in court. None of the other cases cited on the opposing brief reach or can reach other result. Thus, in *Mathews v. Col. Nat. Bank*, 100 Fed. Rep., 393, the Circuit Court of Appeals for the Ninth Circuit, at page 397, said:

> "In the appellate courts of the United States, and "in nearly all, if not all, the appellate courts of the "States, a second writ of error or a second appeal in "the same case only brings up for review the pro- "ceedings of the trial court subsequent to the man- "date, and does not authorize a reconsideration of "any question, either of law or fact, *that was con- "sidered and determined on the first appeal or writ "of error* (*Bridge Co. v. Stewart*, 3 How., 413, 425, "11 L. Ed., 658; *Sizer v. Many*, 16 How., 98, 14 L. "Ed., 861; *Tyler v. Magwire*, 17 Wall., 253, 283, "21 L. Ed., 576; *Phelan v. City and County of San "Francisco*, 20 Cal., 39, 44; *Leese v. Clark, Id.*, 387 "416, 417)."

The New York cases cited destroy the proposition to which they are cited as applied to this case. It is well settled law in Code States, where every fact must be found and where the judgment is set aside for failure to find a material fact, that whether the court below gives a right or a wrong reason, if the judgment was right on the facts, it must stand. This has no application to Hawaii, where no findings need be made, and where the judgment cannot be reversed for failure to find any specific fact, however important such fact

may be, although such fact might destroy the whole judgment. The case cited by appellee from 79 N. Y., 409, directly sustains our contention. There the referee had found that there was no lien, but rendered a personal judgment, which was entered by the court on the report, from which judgment each party appealed to the General Term—the plaintiff from the finding that there was no lien, the defendant from the finding of the personal judgment. The General Term reversed the case on the defendant's appeal, holding that there could be no personal judgment where there was no lien, and ordered a new trial. From this the plaintiff appealed to the Court of Appeals, which held that there was no lien under the findings of the referee, and as a matter of law, there being no lien, no personal judgment could be entered, thus sustaining the General Term. The court then proceeds to say that the point whether the contract was in fact a lien, was not open under this appeal, because the General Term had ignored the appeal of the plaintiff and decided simply upon the appeal of the defendant; that the plaintiff, instead of appealing from this decision, could have proceeded with the new trial and litigated that point, which was not open on his adversary's appeal. Applying this plain conclusion to the present case, all that was open on the former appeal here was what the plaintiff brought up, viz., the single question of election decided against it. Our appeal, bringing up the whole record, is now for the first time before the court.

V.

The persuasive argument (Appellee's Br., p. 14) that the court will be burdened with successive appeals we have already met. It is not our fault that this case came here as it did. We urged at the former hearing that the appeal be affirmed for lack of findings of fact. We said (Reply Br., p. 5):

"It is manifest that there is, in no form in this case, *any* statement of the facts such as is required by the Practice Act and the proper procedure thereunder, as repeatedly held by this court.

"The judgment for defendant is here for review. The opinions below simply enlightens this court as to the grounds on which the judgment was based, but such judgment may be founded on a wrong reason, although from a full and proper statement of the case, as required by the Practice Act, it may be obvious, nevertheless, that the judgment itself was right. Hence the necessity for such statement of facts, which will enable this court to determine whether, upon the facts thus stated, the judgment was correctly rendered. It will be noted, as recited in the opening paragraph of the original opinion of the Supreme Court, that numerous exceptions were argued, but that the court did not rule thereon either way, resting its judgment of reversal, in the first instance, upon the matter of election.

"The failure or refusal of the Supreme Court to make the statement of facts required certainly cannot operate to the prejudice of the appellee. With the reversal of the findings and with no statement of the facts certified here to this court by the Supreme Court of Hawaii in any form, final action here now could result only in the affirmance of the judgment."

In the oral argument, in response to questions from the court, more than once we admitted that in our judgment justice to both parties demanded that the cause be sent back for a statement of the facts, which statement we now have. But this court held that it did have the question of election before it upon a statement of facts taken as true and sufficient for the purpose of determining that question alone. Can it be said that we have had our day in court upon our case because appellee has had his day in court upon a single point ruled against him in the lower court and now ruled in his favor in this court? Such a contention seems to violate the most plain sense of justice.

We did not "advise the court" that it was our "wish to change the statement of facts upon which the court was proceeding by further evidence." We did not "advise the court" that we "wished to adduce any further evidence" or that we wished the findings of fact to be changed or amended (Appellee's Br., p. 18) because it was not in our power; nor are we now asking to change the statement of facts by further evidence. We are simply insisting that the defendant has a right to have the facts on which his rights are to be determined found by the court, and that a finding of facts "taken" without our concurrence merely for the purpose of determining one question on the plaintiff's appeal—which findings do not present the questions vital to our rights—does not show that we "have consented that the findings of fact should stand as the ultimate facts for all purposes." One question alone, viz., of election, had been held to be decisive in favor of the defendant without going farther. What plaintiff appealed from as presented to this court was that, taking the findings of the Circuit Court to be true then the election shown by them defeated his action. All that this court passed upon was that this conclusion, taking these findings, is erroneous.

As to the statement on the same page that our claim that the "order of reversal in the Supreme Court of the Territory was modified by the request of appellee's counsel in the trial court (*sic.*)" is "wholly without foundation in fact," that court (Tr., p. 72) so determined on plaintiff's motion, "made " in order that plaintiff may have a final judgment entered in " the above cause which may be reviewed by a writ of review " in the Supreme Court of the United States" (Tr., p. 71). This court in its opinion has concurred when it declares that the Supreme Court of Hawaii "ordered a judgment for the defendant in order that the case might be brought to this court."

VI.

Certainly the point that in another action this matter has been decided against us was not open on the former appeal. The findings show that the plaintiff, on April 20, 1903, when the order under which the sale was made was entered (Finding 23, p. 107) had on record the equitable replevin, which the court below terms another petition in intervention (Finding 21, Tr., p. 107); that ten days before, on April 10, it had initiated proceedings to take depositions in this proceeding (Finding 22, Tr., p. 107). As Finding 27, by reference, incorporates the 15 Haw., 710, the proceedings by which the appeal from the confirmation of sale were dismissed, and Finding 29, the writ of error from the order of sale, as reported in 16 Haw., 258, it now appears that "the plaintiff in error in the latter appeal assigned for error that "the order of sale did not except the property so claimed," viz., railroad equipment (*Bierce v. McChesney*, 16 Haw., 259). From that case it further appears that the difficulty was that whilst the plaintiff had its claim on file it did not object to the granting of the order of sale, but did protest at the sale by reading the protest referred to in Finding 24, page 107. In that case the court says:

> *"But we are unable to see error in the order of sale which does not purport to authorize the sale of any property of the plaintiff in error but of the Kona Sugar Company. There is no evidence before us of any title of the plaintiff in error in any of the property ordered to be sold. The mere fact that the plaintiff in another suit claims some of the property in the hands of the receiver does not authorize this court to declare the order of sale to be erroneous."*

The writ was dismissed (*Bierce v. McChesney, ubi supra*).

In the appeal from the confirmation of sale the motion was to have the sale declared no sale on the sole ground that the order of sale purported to include and direct the

receiver to sell the railway equipment. After holding that a court of equity has the power to order sale and that "it is also within its power to sell the property in order to pay the expenses of the receivership; the facts were that the receiver, because of insufficient mill capacity, lack of labor, or for other reasons was unable to harvest the crop with sufficient promptness, and that during his incumbency the property of the company deteriorated, and his expenses and liabilities increased at a greater rate than the income," the court continued: "The Kona Sugar Company itself asked that all "its property be sold; the court was satisfied that it was for "the best interests of all concerned that it should be; *and* "*no one interested objected to the making of the order, al-* "*though the attorney of the appellant objected at the time of* "*sale as to certain of the property, on the ground that title* "*was not in the company.* The final proceeds of the sale, "it may be noted, were insufficient to pay the expenses of "the receivership."

The appeal was denied (*McChesney v. Kona Sugar Co.*, 15 Haw., 710).

As the creditors were obliged to advance the expenses of the receivership, the sale for a sum insufficient to pay such expenses makes it perfectly clear that appellant Hutchins, who in fact bought in the property for the creditors, was acting on their behalf. The present appellee so understands it, for in the brief of its counsel on the former appeal (Br., p. 12) it is thus correctly stated:

> "The record fails to disclose for whom Hutchins "acted, but the presumption is strong that it was for "the other creditors."

As it is found (Finding 15, Tr., p. 106) that the "expenses of the receivership," which "the final proceeds of the sale were insufficient to pay," were incurred under the direction of a bondholders' committee appointed for the purpose of superintending the affairs of the corporation in the hands of

a receiver, in the appointment of whom the plaintiff participated and to which agreement it was a party, it is not only inequitable that the plaintiff should now recover his property, the title to which in the same proceedings he was willing to have sold provided that it was sold subject to the claims of the bondholders and lien holders (Finding 17, Tr., pp. 106-7), but it would appear that he has had his day in court and did not resist the order of sale, but merely protested against the sale after the order was made and upon his appeal was held to be precluded because he failed to introduce evidence of his title when he had that opportunity.

DAVID L. WITHINGTON,
ALDIS B. BROWNE,
ALEX. BRITTON,
For Appellant.

Mr. David L. Withington and *Mr. Aldis B. Browne*, with whom *Mr. W. R. Castle*, *Mr. Alexander Britton* and *Mr. J. W. Cathcart* were on the brief, for appellant.

Mr. Charles H. Aldrich, with whom *Mr. Henry S. McAuley* and *Mr. Henry W. Prouty* were on the brief, for appellee.

MR. JUSTICE HOLMES delivered the opinion of the court.

This case has been before this court once already. 205 U. S. 340. It was an action of replevin and was tried by a judge without a jury. The judge found that the allegations of the complaint were proved and that the plaintiff, William W. Bierce, Limited, was entitled to recover. He also made a series of findings in detail, establishing the plaintiff's case and excluding certain defenses. These findings were excepted to on various grounds, among others, that they were not warranted by the evidence, and the whole evidence was attached to the bill of exceptions. Two of the findings were that the plaintiff had not waived a condition precedent to the passing of title to the property replevied, and that it had not elected against its right to bring this action. The case went to the Supreme Court of Hawaii on the exceptions and there, of course, the question was whether it appeared as matter of law that the finding for the plaintiff and the judgment rendered upon it were unwarranted. The Supreme Court held that an election appeared as matter of law, sustained the exceptions, and made the usual order sending the case back for further proceedings in the lower court; but afterwards, on the plaintiff's motion, coupled with an affidavit that it would have no more evidence to offer at a second trial, it ordered judgment for the defendant. Thereupon the plaintiff brought the case here. It was held that the error relied on was not made out against the findings of the trial court, and the judgment of the Supreme Court of the Territory was reversed.

In the discussion here it was assumed that the Supreme

Court of the Territory had power under the local procedure to order judgment as it did, and so to lay a foundation for the appeal. But the difficulties incident to such a course in cases subject to appeal are made manifest by this case. If the Supreme Court had the power to order judgment, obviously the scope of its inquiry before rendering judgment was not enlarged by the subsequent appeal or by the liability to it. When it rendered judgment it was confined to the questions of law presented by the bill of exceptions and the record. Logically, on appeal in such a case this court would be confined in the same way. At the broadest, the only questions would be whether it appeared from the record, as matter of law, that the judgment for the defendant ordered by the Supreme Court, or the judgment for the plaintiff in the court of first instance, or both of them, were wrong. It would be anomalous if the Supreme Court could make the statement of facts which is contemplated by the statutes and which it was said in our former opinion should have been made, in such form as to open questions on which the Supreme Court itself had had no power to pass before entering judgment, and so to present to this court grounds for decision which the Supreme Court of Hawaii could not have taken into account. On the other hand a statement that should present the questions passed upon and no more would simply have presented the record, even if possibly somewhat abridged, or modified by concessions of which there was some trace in the opinion of the court. So not unnaturally, at the subsequent stage the Supreme Court found itself a little perplexed.

Whatever might have been open, in our former decision the only question actually dealt with was whether the judgment of the Supreme Court could be sustained. There were some subordinate exceptions to the admission of evidence and the allowance of an amendment that were not considered here. When the case went back these were taken up and overruled by the Supreme Court. It then made a statement of facts in deference to what was said in our decision, and the defendant

appealed to this court. But this time the Supreme Court did not order judgment, and it may be, that in its present opinion, the former judgment was unwarranted in point of procedure. *Meheula* v. *Pioneer Mill Co.*, 17 Hawaii, 91. It is unnecessary to consider whether our former decision left anything open, in view of the technical scope of the appeal on the one side and the limited inquiry to which our attention was directed on the other. The statement of facts cannot affect that question, nor can it affect the defendant's right to be here. It is enough that the Supreme Court of Hawaii has pursued the usual course upon exceptions, and has not entered or directed a judgment. Therefore, as was decided a few days ago, in *Cotton* v. *Hawaii*, *ante*, p. 162, an appeal does not lie.

Appeal dismissed.

HUTCHINS, TRUSTEE, *v.* WILLIAM W. BIERCE, LIMITED.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

No. 447. Argued November 29, 1908.—Decided December 14, 1908.

An appeal from a judgment of the Supreme Court of Hawaii dismissed because not final. *Cotton* v. *Hawaii*, *ante*, p. 162.

THE facts are stated in the opinion.